United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
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No. 14,367

44

JAMES E. ROBERTS,

Appellant

v.

GLADYS S. ROBERTS,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COBB, HOWARD AND HAYES
JAMES A. COBB
GEORGE E. C. HAYES
JULIAN R. DUGAS
613 F Street, N. W.
Washington, D. C.
Counsel for Appellant

Of Counsel:
Luke C. Moore
613 F Street, N.W.
Washington, D. C.

Washington, D. C. ROBERT I. THIEL EX 3-0625
Printer

STATEMENT OF QUESTIONS PRESENTED

I.

In light of appellant's uncontradicted evidence that he gave up his practice in the District of Columbia, moved to Arkansas, became a registered voter; established a residence; practiced medicine, and paid taxes there, did not the trial court err in finding as a fact that appellant did not acquire a bona fide domicile in the State of Arkansas as found by the Arkansas Court in its decree of divorce.

II.

Whether the reasoning indulged in by the court in support of its findings that appellant did not acquire a bona fide domicile in the State of Arkansas is borne out by the testimony in this cause.

III.

Whether the appellee sustained the burden of proof required to overcome the strong presumption of the validity of an Arkansas decree of divorce in a cause of action seeking a declaratory judgment impeaching the validity of said decree of divorce, when the only evidence before the Court offered on behalf of the Appellee consisted of excerpts from a deposition of the appellant, stipulations by counsel, and certain oral testimony which did not directly support the finding of the Court, and which was susceptible of other rational inferences.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,367

JAMES E. ROBERTS,

Appellant,

v.

GLADYS S. ROBERTS,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case comes to this Court on appeal from a judgment entered on the 4th day of December, 1957 by the United States District Court for the District of Columbia declaring that a decree of divorce entered December 7, 1955 in the Chancery Court of Garland County, Arkansas in the case of James E. Roberts vs. Gladys S. Roberts, No. 30316, to be null and void and that the interest and rights in premises 1233 Kearney Street, N.E. in the District of Columbia are unaffected by the said decree of divorce entered December 7, 1955. The said judgment

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of the Court was final and timely notice of appeal was filed. Jurisdiction for this appeal is to be found in the provisions of Title 28, Section 1291 et. seq. of the U. S. Code as revised.

STATEMENT OF THE CASE

The appellant and appellee, who were husband and wife, had since to-wit the year 1945 lived separate and apart in the District of Columbia. Their marital difficulties since that time have been constantly aired in the courts of this jurisdiction (J. A. 18). During their marital life real estate known as 1233 Kearney Street, N. E., Washington, D. C., was acquired by the appellant and placed in the joint names of the appellant and the appellee and is presently so vested (J. A. 21).

In June 1955, the appellant, because of difficulties experienced in his marital life, decided to change his place of abode from the District of Columbia and establish a domicile in another jurisdiction (J. A. 41, 48-9).

By reason of contact with a physician who formerly practiced in Hot Springs, Arkansas, and based upon investigations previously made regarding the practice of medicine there, the appellant gave up his medical practice in the District of Columbia, and made arrangements to move to the State of Arkansas to set up a medical practice there (J. A. 49).

Prior to leaving the District of Columbia, the appellant gave up his office here and referred his patients to other doctors for professional care (J. A. 41, 42-3, 49, 50); he applied to the Arkansas Medical Board for the privilege to practice medicine in that state (J. A. 32, 51) and resigned several positions held in the District of Columbia (J. A. 50, 61). Further appellant rented his home in the District of Columbia (J. A. 60), attempted to cancel his telephone service at his office but on advice of the telephone company suspended the same instead (J. A. 61-2).

On to-wit, August 28, 1955, appellant left the District of Columbia and moved to Hot Springs, Arkansas. Upon his arrival there the appellant obtained living quarters in a hotel, associated himself with a local doctor in the practice of medicine and commenced working in a hospital. (J. A. 52) Appellant subsequently acquired a four-room apartment with telephone service installed in his name. (J. A. 52) While in Arkansas the appellant was granted the privilege of practicing medicine there by the State of Arkansas Medical Board (J. A. 51-2, and Defendant's Exhibit Nos. 2 and 3), became a registered voter in the state (J. A. 53), paid registration fee and occupation tax for the year 1956 (J. A. 53 and Defendant's Exhibit No. 5).

After having established domicile in the State of Arkansas the appellant on to-wit the 7th day of December, 1955, obtained an absolute divorce from the appellee, Gladys S. Roberts. (Plaintiff's Exhibit No. 1) The appellant remarried in the State of Arkansas and is presently living with his second wife. (Plaintiff's Exhibit No. 3)

By reason of the combined circumstances of his mother's illness; appellant's inability to establish a practice sufficient to sustain himself in Arkansas and by reason of obligations upon him in the District of Columbia, the appellant returned to the District of Columbia on January 13, 1956 (J. A. 58-9) (Defendant's Exhibit No. 9).

Thereafter on the 11th day of May, 1956, the appellee filed a suit in the U. S. District Court for the District of Columbia in which she prayed that the decree of divorce entered December 7, 1955, in the Court of Arkansas be declared null and void, that she be declared the lawful, undivorced wife of the appellant and for the determination of certain property rights of the parties to this action. Thereafter, on November 13, 1957, the case came on for trial in the District of Columbia before a judge sitting without a jury. The appellee presented as evidence certain stipulations (J. A. 20-1, 24-26), excerpts from a deposition taken of the appellant, (TR. 37-58, J. A. 26-39) oral testimony of her brother-in-law, the lessor of appellant's professional office, (Tr. 59-64, 65-71,

J. A. 39-44) and an employee of the Chesapeake and Potomac Telephone Company (J. A. 46-48). The only other evidence adduced at this trial were exhibits and the oral testimony of the appellant (J. A. 48-61, Tr. 77-100, 102).

On December 4, 1957, the Trial Court made Findings of Fact and Conclusions of Law in which it declared null and void the decree of divorce entered December 7, 1955,in the Chancery Court of Garland County, Arkansas between the said James E. Roberts and Gladys S. Roberts and declared the rights of the appellee in premises 1233 Kearney Street, N. E. unaffected by the said Arkansas decree. Judgment was entered in favor of the appellee. Thereafter,the appellant by motion timely filed moved the District Court to vacate the judgment and award a new trial. After a full hearing, appellant's motion was denied (Tr. 106-128, J. A. 76). An appeal from the judgment in favor of the appellee was duly taken to this Court.

RULES INVOLVED

Federal Rules Civil Procedure rule 52(a), 28 U. S. C. A.

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law

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are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

STATEMENT OF POINTS

I.

The Court erred in finding that the appellant did not make a bona fide change of domicile from the District of Columbia to Arkansas.

II.

The Court erred in failing to give full faith and credit to the Arkansas decree of divorce.

III.

The Court erred in failing to hold that the appellee had not borne the burden of proof encumbered upon her to invalidate the Arkansas decree.

IV.

The Court erred in failing to hold that the appellee did not present evidence sufficient to overcome the validity of the Arkansas decree?

SUMMARY OF ARGUMENT

Appellant contends that in the light of his uncontradicted testimony that he gave up his medical practice in the District of Columbia, resigned from his positions in the Medical Society as Clinical Instructor at Freedmen's Hospital and Howard University Medical School, applied for a license to practice medicine in the State of Arkansas after which he moved to that State, obtained a place of residence there, became a registered voter, paid taxes and engaged in the practice of medicine with a local physician and in the hospital there, that the Trial Court's Finding of Fact and its judgment based thereon that appellant

did not acquire a bona fide domicile in the State of Arkansas is erroneous. Appellant further contends that where the evidence presented by the appellee in challenging the validity of a Arkansas divorce decree consisted of written testimony in the form of stipulations, excerpts taken from appellant's deposition, exhibits and oral testimony, and the Trial Court draws inferences, unsupported by such evidence, that the appellant did not acquire a bona fide domicile in the State of Arkansas, this Court should ignore the Finding of the Trial Court and substitute its own.

It is further contended the Trial Court erred when it failed to give full faith and credit to the Arkansas decree of divorce when the only evidence presented by the appellee in challenging same consisted of excerpts from a deposition, stipulations and exhibits which failed to meet the requirements of substantial evidence necessary to undermine the validity of the Arkansas decree.

ARGUMENT

I.

THE COURT ERRED IN FINDING AS A FACT THAT THE APPELLANT DID NOT MAKE A BONA FIDE CHANGE OF DOMICILE FROM THE DISTRICT OF COLUMBIA TO ARKANSAS

By reason of what the appellant believes to be an improper emphasis placed upon his obtaining a divorce in Hot Springs, Arkansas, Garland County, this appellant begins by candidly admitting that among the reasons for his going to another jurisdiction was his desire to validly obtain a divorce. It is not, however, a fact that the appellant undertook to obtain a "technical residence" in Arkansas for the sole purpose of establishing a means of getting the divorce, but on the contrary appellant's firm intent was to establish a residence in Arkansas, and to obtain a divorce in keeping with the laws of that jurisdiction after having become bona fide domiciliary there, with the intent of remaining in that jurisdiction indefinitely. The appellant calls attention to the fact that having attempted in all legitimate ways to bring to a legal end the

marriage relationship between him and the appellee which had ceased to exist in fact in the District of Columbia, he determined, in August 1955, to go into another jurisdiction and get a new start in his profession, because of the frustrating and destructive affect which the facing of his marital difficulties and his inability to resolve same were forcing upon him. In this connection, appellant found that he was losing out in his practice, that he was unable to properly concentrate on his professional work and that he was even losing hold of himself to the extent that he was overindulging in alcoholic beverages (J. A. 48).

Having had a previous contact with a close friend who practiced medicine in Hot Springs, Arkansas and being mindful of the reputed seasonal influx of visitors due to race track advantages which this locality offered, which increased the possibility of his establishing a substantial sustained medical practice there (J. A. 49), the appellant gave up his medical practice, his clinical affiliations with Freedmens Hospital, and his instructional position with Howard University Medical School, (J. A. 49-50) and the Chairmanship of the Board of Censors of the Medical Chirurgical Society (J. A. 61) in the District of Columbia.

Appellant then made all necessary arrangements incident to the establishing of a residence in Hot Springs, Arkansas and of beginning a medical practice in that jurisdiction. As evidence of his bona fide intent and determination, and with a view of doing all the things incident to a change of domicile, the appellant undertook each of the following steps.

Steps Taken Evidencing Appellant's Intention To Abandon His District of Columbia Domicile

1. Appellant informed the lessor of his professional office that he was giving up his practice and his office in the District of Columbia and moving to another jurisdiction. (J. A. 41)

2. Appellant referred his patients to two other doctors for professional care. (J. A. 43, 49, 50; Tr. 68, 79. 81).

3. Appellant, in August 1955, prior to leaving the District of Columbia, applied to the Arkansas Medical Board for the privilege to practice medicine in that State. (J. A. 32, 51).

4. Appellant before leaving the District of Columbia resigned his positions here as Chairman of the Board of Censors of the Medical Chirurgical Society, (J. A. 61) and also resigned as Clinical Instructor at Freedmens Hospital and Howard University Medical School. (J. A. 49-50, Tr. 80, 81).

5. Appellant rented his home in the District of Columbia (J. A. 60).

6. Appellant gave a power of attorney to one of his brothers to operate a business in the District of Columbia and to liquidate appellant's indebtedness (J. A. 49-50).

7. Appellant attempted to cancel the telephone service at his office but was advised by telephone company that there was a convenience in retaining same in a suspended status (J. A. 61-2).

Steps Taken Indicating Appellant's Intention To Acquire New Domicile In Hot Springs, Arkansas

1. Appellant rented a room in this jurisdiction and later acquired a four room apartment with telephone service listed in his name (J. A. 36, 52; Tr. 54, 85).

2. Appellant associated himself with a licensed practitioner in the City of Hot Springs, Arkansas and served in the local hospital there. (J. A. 52)

3. In November 1955, appellant pursuant to an application made in August, 1955, and subject to the routine necessary to obtain same, received a certificate to practice medicine in Arkansas on, to-wit, November 30, 1955. (J. A. 51-2) (Defendant's Exhibit No. 2)

4. Appellant became a registered voter in the State of Arkansas. (J. A. 53-4)

5. Appellant paid registration fee and occupation tax incident to the proper practicing of medicine in Hot Springs, Arkansas. (J. A. 52-53) (Defendant's Exhibit No. 5)

6. After having obtained a divorce and remarrying, appellant and his second wife undertook in the Courts of Arkansas the adoption of an infant child. (J. A. 56)

The bona fides of the steps taken to change his residence from the District of Columbia to Arkansas are attested to not only by the appellant but are corroborated by every line of the testimony and by witnesses offered by the appellee by whose testimony we respectfully submit the appellee is bound. It seems to us of paramount importance that the appellee offered as her witness her brother-in-law, who corroborated the fact that prior to his leaving this jurisdiction appellant had advised him that he was giving up his practice and leaving this jurisdiction (J. A. 41) and this witness, who leased to the appellant his professional quarters, testified that to his knowledge the appellant put a sign on the door notifying his patients that he was giving up the practice and referring them to other doctors to take over his practice (J. A. 43). This witness and a witness from the telephone company were the only witnesses who gave oral testimony on behalf of the appellee.

The only other testimony offered on behalf of the appellee was in the form of testimony by reference to a deposition taken of the appellant. (J. A. 26-39; Tr. 37-58). The Trial Judge in arriving at his conclusion calls attention to his right, which is promptly conceded by the appellant, to take into consideration the privilege which is his of observing the demeanor of witnesses who testified orally in his presence (J. A. 71).

The witness from the telephone company offered by the appellee for the purpose of showing that the appellant had suspended his telephone service testified upon cross examination that it was the custom of the telephone company under circumstances here existing to advise persons against the cancellation of service as against the suspending of same

(J. A. 48) and with regard to this item the appellant testified without contradiction that he had, as a matter of fact, sought to have his telephone service discontinued and allowed of the suspending of same only upon advice of a representative of the telephone company (J. A. 61).

With the presentation of the case in the form indicated by the designation of testimony in appellant's deposition previously taken and the oral testimony of the two witnesses here referred to, the only other witness who appeared before the Court and gave oral testimony was the appellant himself. It is respectfully urged that the oral testimony of the appellant was corroborative of the testimony given in his deposition; upon the excerpts from which appellee relied (J. A. 26-39). To indicate that the Court was persuaded by anything purporting to be the demeanor of witnesses would seem not in keeping with the proffer of testimony in this case and would seem to us to give no basis for findings adopted by the Court as the basis for his decision and judgment.

We are mindful of the rule and the cases that stand for the proposition that the "Findings of Trial Judges will not be disturbed on appeal unless clearly erroneous." See Rule 52(a) Federal Rules of Civil Procedure. U. S. vs. U. S. Gypsum Company, 333 U.S. 364, 68 Supreme Court 525, 92 L. Ed. 746.

On this point Judge Frank speaking for the majority in the case of Orvis v. Higgins (C. A. 2d 1950) 180 F. 2d 537:

> "In light of the Gypsum case we may make approximate gradations as follows; * * * where Trial Judge sits without a jury the rules vary with the character of the evidence; * * * (b) where the evidence is partly oral and balance is written or deals with undisputed facts then we may ignore the Trial Judge's findings and substitute our own * * * for here the finding is that of a Trial Judge and the evidence consists in large part of facts neither side disputes, in circumstances such that the Trial Judge's evaluation of credibility becomes unimportant."

We urge that situation to exist in the instant case and believe that a reference to the entire record will persuade this Court to disregard the findings of the Trial Judge. In the case of U. S. v. U. S. Gypsum Company, Supra, the Court said:

> "* * * A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

In view of the admittedly suggested prerogative on the question of credibility of witnesses, as same applies to the instant case, we find marked pertinency in the language used in American Tobacco Company v. The Katingo Hadjipatera, 194 F.2d 449, 451.

> "(4, 5) We accept, as we must, those of the trial judge's inferences of fact which he drew directly from his estimates of the credibility of witnesses whom he observed as they testified in his presence -- i.e., his inferences (sometimes called 'testimonial inferences') that certain facts existed because he believed some witness or witnesses existed because he believed some witness or witnesses who testified before him that those facts did exit. (sic) We are not required, however, to accept a trial judge's findings, based not on facts to which a witness testified orally, but only on secondary or derivative inferences from the facts which the trial judge directly inferred from such testimony. We may disregard such a finding of facts thus derivatively inferred, if other rational derivative inferences are open. And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the testimony. (Emphasis supplied)

As a matter of fact these litigants need not go beyond their own experience in this court to be impressed with the possibility of the court doing what appellant is now urging the court to do and that is to make its own appraisal of the testimony in this case and disregard the findings of facts made by the Trial Judge.

In the case of Gladys S. Roberts, appellant, vs. James E. Roberts, appellee, 95 U.S. Appeals D.C., p.383, with the testimony adduced in the lower court before it, this court reversed and remanded the cause,

struck aside the finding of the trial judge to the effect that overtures to a reconciliation made on the part of the wife were made in bad faith, and held that the said overtures looking toward reconciliation were made in good faith and that the husband's testimony fell short of overcoming the presumption created by the continuous attempts on the part of the wife to bring about a reconciliation.

A review of the entire evidence in this case leads to the inescapable conclusion that the trial judge's finding that the appellant failed to acquiré a bona fide residence in the State of Arkansas as a jurisdictional prerequisite to obtaining a valid decree of divorce is clearly erroneous.

We are firmly of the belief that the fact that the appellant immediately upon his arriving in Hot Springs and there consulting an attorney looking toward the possibility of obtaining a divorce prejudiced the trial judge into the belief that this fact was controlling on the question of his intent, and we believe that the trial judge erroneously decided that this could be interpreted as meaning that he did not intend to make Arkansas his bona fide place of residence. (J. A. 74-76)

In overruling the appellant's motion for a new trial made below, the trial judge gives as the first of the impelling circumstances upon which he relies, the fact that, immediately upon his arrival in Arkansas, the defendant took steps to get a divorce. (J. A. 75) We do not gainsay the right of the Court to consider this factor along with other circumstances in the instant case, but we point out, that the law in this jurisdiction is, that if the residence were bona fide obtained the fact that the person had in mind obtaining a divorce is not a controlling circumstance.

In the case of Goodloe v. Hawk, 72 App. D.C. 287, this Court said:

> "That leaves only the question whether the appellee by moving to Virginia acquired a Virginia domicle. Neither the fact that she went there motivated by a desire to obtain a divorce nor the fact that she left sometime after securing it forecloses this issue as it can be

> said she had at one time during her residence there an intention to remain for an indefinite period."

We submit that the record completely establishes that a bona fide domicile was intended and obtained by the appellant in the State of Arkansas. The fact that he left Arkansas a few weeks after obtaining a divorce and returned to the District of Columbia is in some sense averted to in the Goodloe v. Hawk, Supra, and we respectfully submit that this circumstance is equally well explained in the testimony of the appellant and is in no sense inconsistent with his intent to acquire a new domicile. The question of domicile is primarily one of fact; aside from one's physical appearance in the jurisdiction, it involves the animus manendi. Expressive of this proposition is the language found in the case of Sweeney v. District of Columbia, 72 App. D.C. 30, 33; 113 F. 2d 25:

> "Traditional formula requires conjunction of physical presence and animus manendi in the new location to bring about a domiciliary change."

There is also significant language in the case of Mitchell v. U.S. Wallace 350, 353, 22 L. Ed. 584 which states the rule as to circumstances establishing the animus manendi as follows:

> "* * * Among the circumstances usually relied upon to establish the animus manendi are; declarations of the party: the exercise of political rights; the payment of personal taxes; a house of residence; and a place of business * * *."

We urge that each and all of these requirements were fully met by the appellant in the instant case (J. A. 41, 50, 52, 53, 54; Tr. 64, 81, 85, 86, 87), together with other significant items of detail corroborating the bona fide intent on the part of the appellant to acquire a domicile in the State of Arkansas. The bona fide intent, to remain in Arkansas, we submit is inconsistent with any intent at one and the same time to return to the District of Columbia. The fact that this appellant did return to the District of Columbia we respectfully submit is explainable by practical circumstances and is not inconsistent with his previously formed intent to remain in Arkansas indefinitely.

There were a number of circumstances, as set out below, contributing toward the eventual return of this appellant to the District of Columbia, any one of which, we respectfully submit, occurring as a contingency arising after the time of the establishment of his domicile in Arkansas would be sufficient to justify his returning to the District of Columbia and do not in any sense negate the intent originally formed by him to become a domiciliary of Arkansas.

We here set forth for the Court's attention circumstances which motivated appellant's return to the District of Columbia. The lucrative or at least life sustaining medical practice to which the appellant had looked forward did not materialize, affected as it was by the change of policy with respect to racing in the area and the results flowing therefrom as they affected not only this appellant but others in the area. (J. A. 58-59). Then too, just prior to his return to the District of Columbia, the appellant received word of his mother's illness which had reached a stage making his return to this jurisdiction a matter of prime expediency or doubtless of necessity (J. A. 59-60). (See Defendant's Exhibit No. 9). A court order directing the payment of maintenance to the appellee in the District of Columbia[1] and the demand for payment to her counsel, as well as the mounting expenses in Hot Springs, Arkansas without the means of meeting of any of same, left no alternative but a change again of locality by the appellant and in this instance the required return to the District of Columbia.[2]

In view of the narrow margin in which any finding of fact of the Court to the effect that there was not a bona fide establishment of domicile by the appellant in Arkansas, it is definitely significant that there is a palpable showing of error in the reasoning given by the court in support of his ruling. In spite of the fact that the testimony showed and the Court found as a fact that appellant having given up his position as a

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1 See Roberts v. Roberts, C. A. No. 2913-52. Said maintenance payments to appellee were continued while appellant was living in Arkansas.

2 Appellant returned to District of Columbia on January 13, 1956.

Clinical Instructor at Freedmens Hospital and Howard University, that he resumed his positions at the beginning of the next school term in the fall of 1956 (See Finding of Fact No. 10, J. A. 13-14). The Court in overruling the motion for the new trial and giving reasons therefor, in referring to the resumption of his connection with Freedmens Hospital stated, "but he immediately stepped back and resumed where he left off a couple of months previously." (J. A. 75) There is, of course, a marked difference between this suggestion that the appellant went back to his official assignment in January, 1956, a couple of months after he had given up the work, and the actual fact he did not go back to that position until the following September 1956. Such errors serving as the basis of the Court's decision, the conclusion at which he arrived must of necessity be erroneous.

We respectfully urge that there is no case in this jurisdiction which in any sense approaches the factual situation in the instant case as to steps taken by the appellant supportive of the contention here that he made a bona fide change of domicile and established a new one in the State of Arkansas.[1] To place the instant case in its proper perspective, we refer this Court to cases in this jurisdiction which have enunciated and persisted in the ruling that where marriages cease to exist in fact that the Court should legally bring same to an end.[2] In the instant case these parties have admittedly lived separate and apart for a period of twelve (12) years without cohabitation (J. A. 23). The law in this jurisdiction broadened its grounds upon which divorce could be had with the apparent idea of lessening the illegality and immorality incident to the

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1 Huggs vs. Huggs, 90 U.S. App. D.C. 195 F.2d 771. In this case the defendant merely obtained leave from his Government position, went to Nevada, stayed for the statutory period and obtained a divorce, remarried, and returned to Washington, D. C.

Hobbs vs. Hobbs, 91 U.S. App. D.C. 68, 197 F.2d 412. Here the defendant obtained leave from his employment here, purchased a round trip ticket to Nevada, obtained a decree of divorce, and returned to the District of Columbia on the same day.

See also White v. White, 80 U.S. App. D.C. 156, 150 F.2d 157.

2 Parks v. Parks, 73 App. D.C. 93, 116 F.2d 556.

holding together of persons in purported matrimonial ties when their lives were entirely separate, and when, as here indicated, the marriage itself was indeed dead.[3] In this cause this marriage is pretended to be kept alive upon what, the appellee, through her counsel, has termed a matter of "principle."[4] (J. A. 23) As was entirely apparent to the trial judge the practical fact of the divorce obtained and the remarriage of the appellant with the residual and possible results of such remarriage are factors which can neither be gainsaid or ignored (J. A. 22-23). We respectfully submit that an entire review of the evidence in this case compels the conclusion that the finding of the Trial Court in the instant case that appellant did not acquire a bona fide domicile in the State of Arkansas was clearly erroneous.

II.

THE COURT ERRED IN FAILING TO GIVE FULL FAITH AND CREDIT TO THE ARKANSAS DECREE OF DIVORCE WHERE THE EVIDENCE PRESENTED BY THE PLAINTIFF WAS INSUFFICIENT TO SUSTAIN THE BURDEN OF OVERCOMING THE VALIDITY OF THE DECREE.

We here remind the Court that it is significant to note that we have under consideration a divorce decree of the State of Arkansas. In that state domicile is a jurisdictional prerequisite for the rendering of such a decree. Regarding that question the State of Arkansas made a finding "that the plaintiff is a bona fide resident of the County of Garland, State of Arkansas, and has been such for the time required by law before the filing of this action * * *". (Plaintiff's Exhibit No. 1)

The Supreme Court of the United States in the case of Esenwein v. The Commonwealth of Pennsylvania, 325 U.S. 279, 89 L.Ed. 1608, 65 Supreme Ct. 1118 said:

"The full faith and credit clause placed the

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3 Martin v. Martin, 82 U.S. App. D.C. 40, 160 F.2d. 20. D.C. Code 1940-Section 16-403.

4 In the instant case appellant agreed to continue maintenance payments to appellee and to make a division of property with her. See Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L. Ed. 1561, and Hopson v. Hopson, 95 U.S. App. D.C. 285, 221 F. 2d 839.

> Pennsylvania courts under duty to accord prima facie validity to the Nevada decree. The burden is on the litigant who would escape the operation of a judgment decreed in another state * * *."

See also Goodloe v. Hawk, supra, in which this Court held there is a strong presumption of validity in favor of a finding made relative to domicile by a sister state.

In the case of Williams v. North Carolina, 325 U.S. 226, 89 L. Ed. 1577, 65 Supreme Ct. 1092, we find language which we believe to be pertinent to the instant case. The Court in discussing the presumption of validity accorded to the decree of a sister state said:

> "The fact that the Nevada court found that they were domiciled there is entitled to respect and more the burden of undermining the verity which the Nevada decree imports rests heavily upon the assailant." (Emphasis supplied.)

We are here concerned that this Court would call to bear the necessity as suggested in these cases that the appellee take the burden of overcoming the presumption of validity of the Arkansas decree by substantial evidence.

Considering all of the evidence presented by the appellee in this case, we submit that she has failed to sustain the burden which rests heavily upon her as one seeking to undermine the validity of a decree of divorce rendered by the State of Arkansas.

This is clear from a casual examination of the record from which it appears that the appellee's evidence consisted of (1) stipulations (J.A. 20, 24-26), (2) excerpts from deposition taken of the appellant (J.A. 26-39), and (3) oral testimony of the appellee's brother-in-law, the lessor of the appellant's professional office, that appellant was giving up his practice and leaving the jurisdiction (J.A. 39-41; Tr. 59-64, 65-71), and (4) testimony by representative of the telephone company that the appellant's telephone was in a state of suspension (J.A. 47). In connection with the testimony of the representative of the telephone

company it is the undisputed testimony of the appellant that when he sought to discontinue his telephone service he was advised by a representative of the telephone company that it would be to his advantage to suspend same and to dispose of it along with his business. (J. A. 62)

Clearly the evidence submitted by the appellee in this case falls short of the requirement of substantial evidence necessary to undermine the validity of the Arkansas decree.

CONCLUSION

It is respectfully urged that a review of the evidence presented in the trial of the instant case clearly shows that the appellant manifested an intent to remain in the State of Arkansas for an indefinite period of time, and became a domiciliary of that State.

To permit the judgment of the trial court to stand, where a casual review of this record shows that the evidence offered by the appellee has failed to sustain the burden encumbered upon her in overcoming the validity of the Arkansas decree, would amount to a failure of this court to give full faith and credit to the judgment of a sister state. The appellant therefore respectfully moves this court to reverse the judgment in the lower court.

Respectfully submitted,

COBB, HOWARD AND HAYES

JAMES A. COBB

GEORGE E. C. HAYES

JULIAN R. DUGAS

613 F Street, N. W.
Washington, D. C.

Counsel for Appellant

Of Counsel:

Luke C. Moore
613 F Street, N. W.
Washington, D. C.

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JOINT APPENDIX

130 [Filed May 11, 1956]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GLADYS S. ROBERTS
1447 "S" Street, N.W.
Washington, D. C.,

Plaintiff

vs.) Civil Action No. 1994-56

JAMES E. ROBERTS
1233 Kearny Street, N. E.
Washington, D. C.,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

1. Jurisdiction herein is based on District of Columbia Code, 1951, Title 11, Section 306, and 28 United States Code, Annotated, Sections 2201, 2202, this being an action for a declaratory judgment for the purpose of determining an actual controversy between the parties, and for other relief, as hereinafter more fully appears.

2. Plaintiff, Gladys S. Roberts, is an adult citizen of the United States, a resident of the District of Columbia, and has been all of her life. Defendant, James E. Roberts, is likewise a citizen of the United States, and a resident of the District of Columbia. He has been a resident of the District of Columbia for more than nineteen (19) years, although several months prior hereto, defendant left the said District of Columbia to go to the State of Arkansas for the only purpose of obtaining a divorce from this plaintiff.

3. Plaintiff and defendant were married at Washington, D.C., on the 27th day of March, 1937, in accordance with the laws of the District of Columbia. Plaintiff has never obtained a divorce or annulment and said marriage has never been terminated by a valid decree of divorce or otherwise.

4. No children were born as issue of said marriage.

5. Plaintiff and defendant are the owners of premises 1233 Kearny
131 Street, Northeast, in the District of Columbia, which they hold as tenants by the entireties.

6. Subsequent to their marriage the parties lived and cohabited together as husband and wife in the District of Columbia until on or about December 6, 1945, when defendant unjustifiably caused plaintiff to leave the marital abode. The following morning plaintiff sought a reconciliation with defendant. Defendant rejected the reconciliation and has rejected all subsequent efforts of plaintiff to affect a reconciliation.

7. On December 11, 1945, plaintiff brought suit in this Court, Civil Action No. 32043, for separate maintenance. Defendant counterclaimed for a limited divorce on the ground of cruelty. On June 23, 1947, this Court dismissed defendant's counterclaim and awarded plaintiff separate maintenance. Thereafter, on December 21, 1950, defendant sued plaintiff in this Court, Civil Action No. 5528-50, for an absolute divorce on the ground of five years voluntary separation. This action was dismissed December 4, 1951. On July 2, 1952, defendant brought another action in this Court against plaintiff, Civil Action No. 2913-52, in which he again sought an absolute divorce from plaintiff, alleging voluntary separation for more than five consecutive years. This cause was tried on its merits, and on April 26, 1954, a judgment was entered therein granting the defendant an absolute divorce from plaintiff. Plaintiff appealed to the United States Court of Appeals for the District of Columbia Circuit which Court, on May 5, 1955, reversed the judgment of this Court entered April 26, 1954, in Civil Action No. 2913-52, and remanded the cause with directions to dismiss the Complaint. On June 15, 1955, this Court entered its order on the mandate vacating its judgment of April 26, 1954, and dismissing the Complaint.

8. Thereafter, on November 2, 1955, defendant instituted an action for divorce against plaintiff in the Chancery Court of Garland County, Arkansas, at Hot Springs, Arkansas, styled "James E. Roberts vs. Gladys A. Roberts, No. 30, 316". On December 7, 1955, a judgment or decree

was entered in said cause by the Chancery Court of Garland County, Arkansas, purporting to grant to the defendant herein an absolute divorce from this plaintiff and purporting further to restore to each party

132 respectively, all property not disposed of at the commencement of the proceedings which either party obtained from or through the other during the marriage. A certified copy of said alleged divorce decree is attached hereto as Exhibit "A" and incorporated herein by reference.

9. Plaintiff has never resided in Garland County, Arkansas, nor at any other place in said State. She was not served with process in said State; has never signed any waivers or consents to said divorce, and neither appeared in nor participated in anyway in said proceeding filed against her in the Chancery Court of Garland County, Arkansas.

10. Plaintiff alleges that the defendant is a practicing physician and surgeon in the District of Columbia and has been such for many years. She alleges upon information and belief that the defendant has never left the District of Columbia with the intention of abandoning his domicile therein or of establishing a new domicile in the State of Arkansas, and that any sojourn he had in said State was for the sole purpose of simulating a change of domicile in order to obtain a divorce from this plaintiff, which had been thrice denied him in this District. Domicile within the State is a jurisdictional requirement for divorce in the State of Arkansas and in obtaining said divorce under such simulated domicile defendant perpetrated a fraud on said Arkansas Court.

11. On October 7, 1955, the same day he was granted the alleged divorce by the Chancery Court of Garland County, Arkansas, defendant filed notice of his intention to wed Sylvesta R. Roberson and made application for a marriage license. Said license was granted and a marriage was solemnized between defendant and the said Sylvesta R. Roberson in Garland County, Arkansas, on December 10, 1955. A certified copy of said Notice of Intention and Application for Marriage License, together with a certified copy of the Marriage License and Certificate of Marriage are attached hereto as Exhibits "B" and "C" respectively and incorporated herein by reference. Said Sylvesta R. Roberson is now residing in the

District of Columbia with the defendant, James E. Roberts, in the house owned by plaintiff and defendant, and is holding herself out as defendant's wife.

12. Plaintiff is informed and believes and therefore alleges that
133 during the latter part of December, 1955, or early January, 1956, the defendant returned to his residence in the District of Columbia and resumed his practice of medicine therein at the same office and address he had theretofore maintained.

13. By reason of the above-mentioned facts, there exists an actual controversy between plaintiff and defendant in which their interests are adverse. The defendant is now claiming that this Arkansas divorce is valid and that plaintiff is no longer his wife. The plaintiff, on the other hand, contends that said divorce is null and void, by reason of fraud perpetrated by defendant upon the Arkansas Court, and that the marriage relationship between the parties has not been terminated by said divorce decree. A determination of this controversy is required of this Court in order that plaintiff's marital status, rights and obligations be freed from doubt and uncertainty; and in order that her interest in the real property owned by the parties be protected.

WHEREFORE, plaintiff prays:

1. That the decree of divorce entered December 7, 1955, in the Chancery Court of Garland County, Arkansas, in the cause of James E. Roberts vs. Gladys A. Roberts, No. 30, 316, be declared to be null and void.

2. That plaintiff be declared the lawful, undivorced wife of the defendant, James E. Roberts.

3. That this Court adjudge that plaintiff's interest and rights in 1233 Kearny Street, Northwest, in the District of Columbia, are unaffected by the alleged decree of divorce entered on December 7, 1955, in the Chancery Court of Garland County, Arkansas, in the cause of James E. Roberts vs. Gladys A. Roberts, No. 30, 316.

4. A declaratory judgment, binding on the parties hereto, settling and declaring the rights, interests and legal relationships of the respective parties in and to and by reason of the matters hereinbefore detailed.

5. For counsel fees and costs.

6. For such other and further relief as to the Court may seem just and proper.

/s/ Gladys S. Roberts

134 [VERIFICATION]

[JURAT, dated May 10, 1956.]

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135 [Filed May 11, 1956] Exhibit "A"

IN THE CHANCERY COURT OF GARLAND COUNTY, ARKANSAS JUNE 1955 TERM THEREOF.

AND THEREAFTER, on the 7th day of December, 1955, the same being a day of the regular term of said Court, there was present and presiding the Honorable Sam W. Garratt, Chancellor, when the following, among other proceedings, were had, to-wit:

James E. Roberts ----------Plaintiff,

No. 30,316 Vs. Divorce Decree.

Gladys A. Roberts ----------Defendant.

On this day comes the plaintiff, James E. Roberts, in person and by his Solicitor, Earl J. Lane, Esq., and the defendant, Gladys A. Roberts, comes not, and having failed to demur, answer or otherwise plead herein and being three times called at the bar of the Court, is adjudged in default, it appearing to the Court that due service of process has been had on the defendant by the publication of a Warning Order, issued on the Complaint, for the time required by law, and that Michael B. Heindl, Esq., a regular practicing Solicitor at the bar of this Court, was appointed more than thirty days prior to this date to represent the non-resident defendant, and that he has filed his written report herein; and this cause being reached upon the call of the calendar is submitted to the Court for its consideration and judgment upon the plaintiff's Complaint, depositions filed herein on behalf of the plaintiff, proof of publication of Warning Order, and the report of the Attorney ad litem.

The Court being well and sufficiently advised as to all matters of fact and law arising herein, and the premises being fully seen, doth find: that the plaintiff is a bona fide resident of the County of Garland, State of Arkansas, and has been such for the time required by law before the filing of this action and rendition of this Decree; that all of the other allegations of the Complaint are fully sustained by the evidence submitted on behalf of the plaintiff, and that the plaintiff, James E. Roberts, is entitled to an absolute divorce from the defendant, Gladys A. Roberts.

136 IT IS, THEREFORE, ordered, adjudged and decreed by the Court that the bonds of matrimony subsisting between the plaintiff, James E. Roberts, and the defendant, Gladys A. Roberts, be and the same are hereby annulled, cancelled, set aside and same shall be forever held for naught, and the plaintiff is granted an absolute divorce from the defendant; that the plaintiff and defendant be and they hereby are restored to all the rights, privileges and immunities of a single and unmarried person; that all property not disposed of at the commencement of this action which either party obtained from or through the other during the marriage hereby annulled, and in consideration or by reason thereof, be restored to them respectively.

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137 CERTIFICATE

STATE OF ARKANSAS)
) SS.
COUNTY OF GARLAND)

I, Sherlon Hilliard, Clerk of the Chancery Court for and within the County and State aforesaid, do hereby certify that the annexed and foregoing Two pages contain a true and compared copy of the DIVORCE DECREE in the case of JAMES E. ROBERTS Vs. GLADYS. A. ROBERTS as the same appears on record in Chancery Record Vol. 60 at Page 75 of the records of the Garland Chancery Court.

IN TESTIMONY WHEREOF, I hereunto set my hand as Clerk and affix the official Seal of the Garland Chancery Court, this the 20th day of MARCH, 1956.

Sherlon Hilliard, Clerk

By /s/ Jeanne Hardgrove
Deputy Clerk.

---

138 EXHIBIT "B"

APPLICATION FOR MARRIAGE LICENSE
NOTICE OF INTENTION TO WED

STATE OF ARKANSAS--COUNTY OF GARLAND -- No. - - - -

in compliance with Act No. 112, enacted by the General Assembly of the State of Arkansas, 1945,

Comes JAMES E. ROBERTS, whose address is 717 Pleasant Street, Hot Springs, Ark., age 52, and files intention to wed SYLVESTA R. ROBERSON, whose address is Hot Springs, Arkansas, age 44.

Signed this 7th day of DECEMBER, 1955.

JAMES E. ROBERTS

Filed in County Clerks Office on 7th day of DEC. 1955 at _____ o'clock _____M.

FRED W. SHELTON
County Clerk.
By _____
Deputy Clerk

License issued 10th day of DECEMBER, 1955, at _____o'clock _____M. Book 66 Page 170

FRED W. SHELTON
By LUCILLE THOMAS.

MEDICAL CERTIFICATE
ON FILE.

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139 [VERIFICATION]

EXHIBIT "C"

140 [Filed May 11, 1956]

CERTIFIED COPY OF MARRIAGE LICENSE

STATE OF ARKANSAS,)
) SS.
COUNTY OF GARLAND,)

TO ANY PERSON AUTHORIZED TO SOLEMNIZE MARRIAGE--GREETINGS:

YOU ARE COMMANDED to Solemnize the Rite and Publish the Banns of Matrimony between M JAMES E. ROBERTS of HOT SPRINGS in the County of GARLAND and State of ARKANSAS, aged -52- years, and M SYLVESTA R. ROBERSON of HOT SPRINGS in the County of GARLAND and State of ARKANSAS aged -44- years, according to law, and do you officially sign and return this License to the party herein named.

WITNESS my hand and official seal, this 10th day of DECEMBER A. D. 1955

FRED W. SHELTON, County Clerk

(SEAL) By HARRY LEWIS D. C.

CERTIFICATE OF MARRIAGE

STATE OF ARKANSAS,)
) SS.
COUNTY OF GARLAND)

I, E. M. JOHNSON do hereby certify that on the 10th day of DECEMBER A. D. 1955, I did duly and according to law, as commanded in the foregoing License, Solemnize the Rite and Publish the Banns of Matrimony between the parties therein named.

WITNESS my hand, this 10th day of DECEMBER A. D. 1955.

E. M. JOHNSON

My Credentials are recorded in the Recorder's Office PULASKI County, Arkansas, Book 2, Page 87

CERTIFICATE OF RECORD

STATE OF ARKANSAS)
)SS.
COUNTY OF GARLAND)

I, FRED W. SHELTON, Clerk of the County Court of said County, certify that the above License for the Certificate of Marriage of JAMES E. ROBERTS, and M SYLVESTA R. ROBERSON were, on the 12th day of DECEMBER, 1955, filed in my office, and the same are now duly recorded.

WITNESS my hand and seal of said Court this 12th day of DECEMBER A. D. 1955

FRED W. SHELTON
Clerk of the County Court

(SEAL) By LUCILLE THOMAS D. C.

CLERK'S CERTIFICATE OF TRANSCRIPT

STATE OF ARKANSAS,)
)SS.
COUNTY OF GARLAND)

I, FRED W. SHELTON, Clerk of the County and Probate Court, within and for the County and State aforesaid, DO Hereby Certify that the foregoing written matter contains, a true, complete, and perfect transcript of the MARRIAGE RECORD as therein set forth, and as the same appears of record in Marriage Record Book Volume 66 Page 170, Garland County, Arkansas.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Hot Springs, Arkansas this the 5th day of APRIL, A. D. 1955.

FRED W. SHELTON
County and Probate Clerk

By _____

141 [Filed June 19, 1956]

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

1. The defendant admits the jurisdictional statement contained in paragraph 1 of the Complaint.

2. The defendant, James E. Roberts sets forth that he is an adult citizen of the United States and had been a resident of the District of Columbia until the mid-summer of 1955, at which time he became a resident of the State of Arkansas and took up his abode in the said State. The defendant further states that he met the voting requirements in the State of Arkansas and has voted there in the past and continues to maintain his voting rights in the said State. The defendant denies the allegations of paragraph 2 of the Complaint wherein it is stated that he went to the State of Arkansas for the purpose of obtaining a divorce from this plaintiff. The defendant affirmatively states that he in good faith became a resident of the State of Arkansas with full intentions of permanently residing there.

3, 4, and 5. It is admitted that the plaintiff and defendant were married in the District of Columbia on the 27th day of March 1937. The defendant states that the said marriage has been terminated as a result of a decree of the Chancery Court of Garland County, Arkansas dated

142 December 7th 1955 granting an absolute divorce to the defendant from the plaintiff herein named. It is admitted that no children were born as a result of the said marriage and further, that premises 1233 Kearny Street, N.E. was purchased by the plaintiff and defendant during the marriage as tenants by the entireties. The defendant sets forth however, that as a result of the aforesaid decree of the Arkansas Court the interest of the plaintiff in the aforesaid property has been dissolved and that she no longer has any dower interest or interest as a tenant by entireties in the aforesaid property. Further, this defendant avers that the aforesaid real estate was acquired through his efforts and with the money of this defendant alone, and that the plaintiff has no interest in the said property by means of contribution other than that created by law as a result of the tenancy by the entireties.

6. The defendant denies that he unjustifiably caused the plaintiff to leave the marital abode on or about December 6th 1945. The defendant affirmatively stated that he and the plaintiff have been separated without cohabitation since December 6th 1945, that there is no hope of reconciliation and that on his part there have been no bona fide overtures of reconciliation. Further, the alleged attempts for reconciliation by the plaintiff have not been made in good faith, but have been inspired either by advices given to the legal implications of such steps or by an obsessed desire to thwart the defendant in any attempt to obtain a divorce.

7. The allegations of paragraph 7 of the Complaint are admitted.

8. The defendant sets forth that he did institute an action for divorce against the plaintiff in the Chancery Court of Garland County,
143 Arkansas and that on December 7th 1955 a Judgment was entered in said cause granting to the defendant herein an absolute divorce from the plaintiff and restoring to each party respectively, all property not disposed of at the commencement of the proceedings which either party obtained from or through the other during marriage.

9. The defendant has no knowledge as to whether or not the plaintiff in this cause was served with process of the Arkansas Court or whether she signed any waivers or consents to the divorce, but does admit that she did not appear in person in the Chancery Court of Garland County, Arkansas.

10. The defendant denies that he abandoned his domicile in the District of Columbia for the purpose of simulating a change of domicile in order to obtain a divorce in the State of Arkansas. This defendant affirmatively avers that he, in good faith, did change his domicile from the District of Columbia to the State of Arkansas for the purpose of permanently residing in the said State of Arkansas, and that he did, and continues to exercise his voting privilege in the said State, and that he has been admitted to practice medicine by the Medical Board of the said State. Further, that he has paid the necessary tax in the City of Hot Springs, Arkansas in order to practice there and has in fact practiced and treated patients in the City of Hot Springs, Arkansas. The defendant

further affirmatively states that the only reason he has returned to the District of Columbia since establishing his residence in the State of Arkansas was because of the sudden serious illness of his mother and the threatened failure of a Diaper Washing Business in which he had a substantial interest and which was the sole means of income for the other members of his family.

144 11. This defendant admits that he has married Sylvesta R. Roberson in Garland County, Arkansas, December 10th 1955.

12. This defendant admits that since his return to the District of Columbia he has been obliged to resume his practice of medicine in order to maintain his livelihood and in order to comply with the order of this Court as to maintenance and support for the plaintiff.

13. In answer to allegations of paragraph 13, of the Complaint, this defendant sets forth that the Arkansas decree attached to the Complaint in the above captioned cause is valid and that the plaintiff is no longer his wife. Further, that this present action is a collateral attack upon the Arkansas decree and should not be allowed to be carried forward by this Court.

WHEREFORE, the defendant prays, having fully answered the allegations of the aforesaid Complaint, that the said Complaint be dismissed with prejudice.

/s/ James E. Roberts

[Verification]

[JURAT, dated June 18, 1956.]

---

145 [Filed December 4, 1957]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial and the Court, having heard and considered the evidence presented and the stipulations entered into by both parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff and defendant were lawfully married in the District of Columbia on the 27th day of March, 1937.

2. No children were born as a result of said marriage.

3. Defendant has been a practicing physician in the District of Columbia since 1941.

4. The matrimonial domicile of the plaintiff and defendant was in the District of Columbia and both parties have at all times remained residents of the District of Columbia.

5. Plaintiff and defendant lived together in the District of Columbia until about December 6, 1945, when they separated.

6. Prior to their separation, plaintiff and defendant acquired premises 1233 Kearny Street, Northeast, Washington, D.C., as tenants by the entireties and title to said real property is still in their names as such tenants. Defendant was occupying said premises at the time he departed for Arkansas on or about August 28, 1955.

7. Three times after the separation the defendant sought unsuccessfully to obtain a divorce in the District of Columbia, the last case having been dismissed on June 15, 1955.

8. In August, 1955, defendant removed his name plate from his
146 office, closed his office and directed his patients in person and by notice posted on the door of the office to other physicians. On or about August 28, 1955, he left the District of Columbia and went to Hot Springs, Arkansas. On a day or so after his arrival in Arkansas he consulted an attorney concerning obtaining a divorce.

9. In August, 1955, prior to leaving the District of Columbia, the defendant applied to the State Medical Board for a license to practice medicine in Hot Springs, Arkansas. On November 30, 1955, he received a license to practice medicine in Hot Springs, Arkansas. Forty-five days after obtaining this license he resumed his practice in the District of Columbia.

10. Prior to his leaving the District of Columbia for Hot Springs, Arkansas, defendant ceased to act as chairman of the Board of Censors

of the Medical Chirurgical Society, and ceased to act as Clinical Instructor at Freedman's Hospital, Howard University, which position he resumed at the beginning of the next school term in the fall of 1956.

11. In August, 1955, defendant rented his home at 1233 Kearny Street, Northeast, partly furnished, and stored the remaining furniture in the basement of the house. During his absence from the District of Columbia, the telephone, gas, electric and fuel bills at his home remained in his name. He made no arrangements with his landlord for the discontinuance of his office lease which was not to expire until February 14, 1956. He carried his small equipment with him to Arkansas, and left his large office equipment in his office in the District of Columbia.

12. Defendant, shortly after his arrival in Hot Springs, Arkansas, changed his place of abode from a room in a hotel to a four room apartment, and had telephone service installed.

13. The Arkansas law with respect to divorce requires domicile in the state for three months next before the entry of a final judgment of divorce and two months before the commencement of the action.

147 14. On November 2, 1955, defendant brought suit against the plaintiff in the Chancery Court for Garland County, Arkansas, for a divorce, said cause being known as "James E. Roberts vs. Gladys A. Roberts, No. 30,316." Plaintiff, Gladys S. Roberts is the same person referred to as Gladys A. Roberts in said Arkansas proceeding.

15. Plaintiff was not personally served with process in the State of Arkansas in said divorce action; did not appear personally or by attorney nor participate in said proceeding in any way and did not sign any waiver or consent therein. Constructive service was made upon the plaintiff herein in the District of Columbia.

16. On December 7, 1955, a decree of divorce was entered in said Arkansas action purporting to grant to the defendant herein an absolute divorce from the plaintiff herein and purporting further to restore to each party respectively all property not disposed of at the commencement of the proceeding that either party obtained from or through the other during the marriage.

17. On December 7, 1955, defendant served notice of intent to wed and applied for an Arkansas marriage license to marry one Sylvesta R. Roberson, and thereafter on December 10, 1955, defendant and the said Sylvesta R. Roberson went through a marriage ceremony in Hot Springs, Arkansas.

18. On January 13, 1956, defendant returned to the District of Columbia and resumed his practice of medicine in said District in the same office that he had occupied prior to his leaving for the State of Arkansas; and resumed his residence at 1233 Kearny Street, N. E.

19. The defendant had not been to Hot Springs, Arkansas, prior to the time of his departure from the District of Columbia in August, 1955. He did not take his automobile with him. He gave no notice of change of address to the Post Office Department, the building and loan
148 association which held a trust note on his said home, or to the publication to which he subscribed. Although he opened a bank account in Hot Springs, he maintained his bank accounts in the District of Columbia and also continued in his position as President of the Empire Diaper and Linen Services in the District of Columbia.

20. Defendant paid poll tax in Arkansas for 1956 and voted as an absentee in 1956. He did not vote in the year 1957.

21. His office telephone was not disconnected but service was suspended during the period that he was in Arkansas, and upon his return to the District of Columbia, January 13, 1956, said telephone service was recommenced with the same telephone number that he had prior to his leaving.

22. During June or July, 1955, he had made repairs to his office in the District of Columbia.

23. The defendant did not make a bona fide change of residence and his leaving the District of Columbia and acquiring a technical residence in Arkansas was done solely for the purpose of establishing a means of getting a divorce.

CONCLUSIONS OF LAW

1. The Chancery Court of Garland County, Arkansas, did not acquire jurisdiction and therefore, the decree of divorce entered December 7, 1955, by said court in the cause of James E. Roberts vs. Gladys A. Roberts, Number 30,316, is null and void.

2. The plaintiff herein, Gladys A. Roberts, is the lawful, undivorced wife of the defendant, James E. Roberts.

3. The plaintiff's interests and rights in premises 1233 Kearny Street, N.E., in the District of Columbia, are unaffected by the alleged decree of divorce entered December 7, 1955, in the Chancery Court of Garland County, Arkansas, in the cause of James E. Roberts vs. Gladys A. Roberts, Number 30,316.

149 /s/ Alexander Holtzoff
Judge

Seen:

/s/ George E.C. Hayes
Attorney for Defendant

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150 [Filed December 4, 1957]

JUDGMENT

This action came on to be tried and the Court, having heard and considered the evidence presented by both parties and having made its findings of fact and conclusions of law, it is by the Court this 4th day of December, 1957,

ORDERED, ADJUDGED AND DECREED:

(1) That the decree of divorce entered December 7, 1955, in the Chancery Court of Garland County, Arkansas, in the cause of James E. Roberts vs. Gladys A. Roberts, No. 30,316, is null and void and that plaintiff herein, Gladys S. Roberts, is the lawful, undivorced wife of defendant, James E. Roberts.

(2) That plaintiff's interests and rights in premises 1233 Kearny Street, N.E., in the District of Columbia, are unaffected by the alleged

decree of divorce entered December 7, 1955, in the Chancery Court of Garland County, Arkansas, in the cause of James E. Roberts vs. Gladys A. Roberts, Number 30,316.

(3) That plaintiff recover from the defendant her costs herein.

/s/ Alexander Holtzoff
Judge

Seen:

/s/ George E.C. Hayes
Attorney for Defendant

---

151 [Filed December 14, 1957]

MOTION FOR A NEW TRIAL

Comes now the defendant, James E. Roberts, by his counsel, Cobb, Howard & Hayes and moves the Court to grant a new trial in the above entitled cause and for reasons therefor states:

1. That the findings of fact made by the Court are contrary to the evidence and the weight of the evidence.

2. That the findings of fact made by the Court are contrary to the law in such cases made and provided.

3. That the Court, without justifiable reason so to do, rejected and discredited uncontradicted testimony offered by the defendant.

4. That the Court, without justifiable reason so to do, failed to properly appraise testimony favorable to the defendant offered by witnesses called by the plaintiff.

5. That the Court, without proper supporting testimony or reasonable inferences to be drawn from testimony adduced at the time of trial, improperly found that the matrimonial domicile of the plaintiff, and the defendant, was in the District of Columbia, and both parties have at all times remained residents of the District of Columbia.

6. That the Court failed to give full faith and credit to the divorce judgment granted by the Supreme Court of Arkansas.

7. That the Court by its judgment countenanced and sanctioned a collateral attack upon the Arkansas judgment of divorce.

8. That the Court by its judgment virtually perpetuated between the parties to this litigation a false state of matrimony and violated and rendered nil the intendment of congress in promulgating the divorce laws effective in the District of Columbia since to wit the 3rd day of March, 1901 and August 7, 1935.

152 9. That the Court, by its conclusions of law and judgment entered in this cause failed to recognize the law established by the decisions having to do with the primary subject here involved, as established by the highest Court of this jurisdiction and by the Supreme Court of the United States.

10. That the Court, by its findings apparently improperly emphasized and based its conclusions of law upon the interpreted intent of the defendant to remarry and the fact that defendant approximately a month after the divorce was obtained, returned to live in the District of Columbia, and resumed his practice of medicine in said District, when as a matter of fact the entent to marry and the return to Washington, explained by the defendant and uncontradicted by the plaintiff, were matters incident only to the fundamental question of domicil and residence, upon which we respectfully submit, the Court ruled improperly.

11. And for other good and sufficient reasons to be urged at the time of the hearing of this motion.

/s/ George E. C. Hayes
Attorney for Defendant

COBB, HOWARD & HAYES
613 F Street, N. W.
Washington, D. C.

[Certificate Of Service]

153 [Filed January 6, 1958]

ORDER OVERRULING MOTION FOR NEW TRIAL

Upon the coming on for hearing of the motion filed herein by defendant, for a new trial, it is this 6th day of January, 1958, ordered that said motion be, and the same is hereby denied.

HARRY M. HULL, Clerk

By /s/ Irene B. Burroughs
Deputy Clerk.

By direction of
Judge Alexander Holtzoff

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154 [Filed January 14, 1958]

NOTICE OF APPEAL

Notice is hereby given this 14th day of January, 1958, that the defendant hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of December, 1957, and the 6th day of January, 1958 in favor of the plaintiff against said defendant.

/s/ George E. C. Hayes
Attorney for Defendant

Copy to:

Joseph Waddy, Esq.
615 F Street, N. W.
Washington, D. C.

[Filed February 17, 1958]

1 EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.

November 13, 1957.

The above-entitled motion came on for trial before the Honorable ALEXANDER HOLTZOFF, United States District Judge, at 2:30 o'clock p. m.

* * * *

MR. WADDY: Among the items that are admitted by counsel for both parties is the marriage of the parties, that they were married in the District of Columbia on the 27th of March, 1937.

THE COURT: That is stipulated, Mr. Hayes?

MR. HAYES: Yes, Your Honor.

MR. WADDY: It is also stipulated that the plaintiff, Gladys S. Roberts, has never obtained a divorce or an annulment from the defendant, James E. Roberts.

MR. HAYES: Of course, we stipulate only to the extent that we know of no such divorce ever having been obtained.

THE COURT: Either you stipulate or not.

MR. HAYES: The only concern is that he says we stipulate that she didn't do something.

THE COURT: Do you stipulate that, aside from the alleged divorce decree involved in this case, there has been no divorce between the parties?

MR. HAYES: We have been parties to no other divorce action, yes.

THE COURT: Very well.

MR. WADDY: It is agreed that the domicile of the defendant prior to his departure from the District of Columbia in August of 1955 was in the District of Columbia. It is agreed that plaintiff's domicile was in the District of Columbia and has continued to be in the District of Columbia. It is agreed that, on three occasions prior to the time that this divorce was granted, the defendant James E. Roberts attempted to obtain a divorce from the plaintiff Gladys S. Roberts in the District of Columbia, the latest case having been dismissed on June 15, 1955.

MR. HAYES: If Your Honor please, with respect to that, Mr. Waddy has spoken to me about that and I said that the records of the Court, of course, would speak for themselves.

THE COURT: Then you did not stipulate?

MR. HAYES: I don't think I need to stipulate that. He has the record about which there is no issue.

THE COURT: It would be helpful, Mr. Hayes, if you would stipulate that that is the record so that the Court's time would not be consumed

studying formal records.

MR. HAYES: If Your Honor please, I have no objection to stipulating what he has just said with respect to the fact that these divorce actions were had and that the last case was dismissed, as he has just indicated.

MR. WADDY: It has been agreed that the plaintiff, Gladys S. Roberts, was not served with process within the state of Arkansas and that she made no appearance and did not participate in the proceedings in Arkansas.

MR. HAYES: Are you willing, Mr. Waddy, as a part of that, to stipulate that she was served in the District of Columbia?

MR. WADDY: By constructive service in the District of Columbia by registered mail, yes, I will. It is agreed that title to premises 1233 Kearny Street, Northeast, of record is in the plaintiff and defendant as tenants by the entirety; and it is stipulated that the Arkansas law requires residence within the state for a period of three months, and two months prior to the filing of the proceedings for the divorce.

THE COURT: Three months prior to what time?

MR. WADDY: It requires a total residence requirement of three months, and he must live two of those three months in the state before the proceedings can be begun.

THE COURT: In other words, three months before the trial and two months before the filing of the suit.

MR. WADDY: Two months before filing suit and a month thereafter.

THE COURT: Before the case can be tried?

MR. WADDY: Before the case can be tried.

THE COURT: I see.

* * * *

THE COURT: Why didn't he get his divorce here where his wife could defend the case instead of going to a distant point where his wife might be handicapped in defending?

MR. HAYES: If Your Honor please, there is no question but what

that man was desirous of getting a divorce. The records will show, as Mr. Waddy indicated, that in this jurisdiction there had been refusals of divorce.

THE COURT: On what grounds was the divorce granted in Arkansas?

MR. HAYES: On the grounds of three years of separation. These people have been separated some 12 years or more.

THE COURT: Here he could have gotten divorce on five years of separation.

MR. HAYES: As a matter of fact, if Your Honor please, he attempted to get a divorce on the grounds of five years of voluntary separation. The lower Court took the position that overtures that had allegedly been made were not in good faith. The upper Court reversed that and took the position that she had made overtures which were in good faith, and as Mr. Waddy has indicated, that action was dismissed.

* * * *

THE COURT: Will counsel please come to the bench?

(At the Bench.)

THE COURT: Gentlemen, these cases involving the validity of the marital status sometimes present some heartrending problems and some very serious judicial consequences, sometimes to innocent persons. Are there any children by either of the two marriages?

MR. HAYES: No, Your Honor. There is now an adopted child by the marriage that has just been undertaken.

THE COURT: How old is the second wife?

MR. HAYES: 44.

THE COURT: In other words there is not likely to be any issue of the second marriage.

MR. HAYES: I am hesitant to say.

THE COURT: There may be.

MR. HAYES: Well, yes, there may be.

THE COURT: That is one of the things that is always troubling the Court in these cases, because the possibility of some poor little

innocent child being declared illegitimate is a very serious matter.

I would like to ask you this, gentlemen: Is this dispute over a property settlement, in its ultimate analysis?

MR. WADDY: It is not.

18 MR. HAYES: From our point of view, Your Honor, this man is perfectly willing to continue to pay the maintenance under the order that the Court has already ordered.

THE COURT: I just thought this, that if it were a question of money and division of property that perhaps there could be some amicable arrangement and the action dropped.

MR. WADDY: We have explored that from every angle over a period of twelve years, and my client takes the position that it is her husband; that she has a principle upon which to stand.

THE COURT: How long had they been separated before he went to Arkansas?

MR. HAYES: Approximately 12 years.

MR. WADDY: About 12 years, and during which time there had been three attempts by him to obtain a divorce in the District of Columbia.

THE COURT: In other words, she has lost a good deal of her original equity because they had not been living together for 12 years. It isn't as though he just pulled up stakes and left her. Twelve years is a long time.

Very well. I suppose we will have to proceed and try the issues. I am always fearful of the possibility of somebody's legitimacy being affected by the outcome of these cases and that is why I asked you to come to the bench.

MR. HAYES: From the property interest standpoint we are per-

19 fectly willing and have always been, to allow her to participate in any way in which she is entitled property-wise.

* * * *

32 RULING BY THE COURT

THE COURT: At the conclusion of the opening statements of counsel there arose a question in the mind of the Court whether the case

presented a justiciable controversy justifying the Court in entertaining an action for declaratory judgment. After hearing arguments of counsel, and on the authority of the case of Baumann vs. Baumann, 250 New York 382, and the decision of the Supreme Judicial Court of Massachusetts,

33 Hogan vs. Hogan, 70 N.E. 2d. 821, the Court has come to the conclusion that there is a justiciable controversy and that this action for declaratory judgment will lie.

The Court might add that of course, as has been indicated by the decisions of the Court of Appeals of this circuit, the Court should be reluctant to pass upon the validity of a divorce decree of another state and should do so only when there is no alternative and when the case cannot be disposed of in some other way. This Court is of the opinion that the case at bar is such a case and therefore will entertain the action.

* * * *

34 MR. WADDY: Yesterday afternoon Mr. Hayes and I met together and we are prepared to state to the Court as follows:

The following matters of fact are stipulated with the understanding that either party, if he so desires, may offer further evidence explanatory of those facts.

First. The defendant did not take his automobile with him to Arkansas.

Second. The telephone, gas, electric and fuel bills remained in the name of the defendant at his home in the District of Columbia.

Third. That no notice of change of address was sent either to the Post Office Department, the Building and Loan Association, or to the publications to which the defendant subscribed either prior to leaving the District of Columbia or during the time he was in Hot Springs, Arkansas.

Fourth. That he maintained his bank account in the District of Columbia.

Fifth. That he opened a bank account in Arkansas shortly after his arrival there.

Sixth. That he consulted an attorney concerning obtaining a divorce within a day or so after his arrival in Hot Springs.

35 It is further stipulated that the following documents may be admitted into evidence without formal proof, subject to objection as to relevancy and materiality.

One of those documents has already been stipulated to in the pretrial order. That was the one with respect to the application for marriage and the marriage license.

Second, the Arkansas divorce proceedings.

Third, the Arkansas State Medical Board certificate issued to the defendant to practice, dated November 30, 1955, and a letter from the Secretary of the State Medical Board of the same date.

Fourth, a certificate of payment for the registration fee for the year 1956 from the Arkansas State Medical Board.

Fifth, a receipt for $12.50 payment of occupation tax in Hot Springs for the year 1956, said receipt being No. 280.

Those matters have been stipulated.

THE COURT: Are you not going to stipulate concerning his prior residence and his going to Arkansas, and so on?

MR. WADDY: We did that I thought yesterday. Yesterday we stipulated that prior to his going to Arkansas he was domiciled in the District of Columbia; that the plaintiff is domiciled in the District of

36 Columbia and has always been domiciled in the District of Columbia.

THE COURT: And that the matrimonial domicile was here.

MR. WADDY: And that the matrimonial domicile was here and that the wife never was served in Arkansas nor did she participate in any way in the Arkansas divorce, or annulment.

THE COURT: Have you stipulated the date on which the defendant returned to the District of Columbia?

MR. HAYES: We are going to offer the defendant. There was some discussion between us as to what the date was and therefore it wasn't stipulated.

THE COURT: There is no compulsion to stipulate, of course, if you don't want to stipulate.

MR. HAYES: I was about to say with regard to the question of not having been served, I think the stipulation on yesterday called attention to the fact that she was constructively served.

THE COURT: Oh, yes, but there is no question about that, but there was no personal service and no appearance.

MR. WADDY: No appearance; no waiver.

THE COURT: You are not able to stipulate on the date on which he returned to live in Washington?

37 MR. WADDY: It is stipulated it was January 13, 1956.

THE COURT: It is stipulated then that he returned to live in Washington on January 13, 1956.

MR. WADDY: That is correct.

THE COURT: And that he resumed his practice of medicine here.

MR. WADDY: Yes, Your Honor.

* * * *

MR. WADDY: I would hope to save the time of the Court by offering certain portions of the deposition of the defendant which was taken on May 22, 1957.

THE COURT: Very well.

MR. WADDY: Page 3 of the deposition beginning at line 5:

"Q Your occupation, of course, is a physicain?

"A Physician.

"Q And where is your office located?

"A 1209 Q Street.

"Q Was it located there prior to this absence that you say took place in the summer of 1955?

"A Yes.

"Q And how long had you been practicing at that location?

38 "A 1941.

"Q Since 1941?

"A Yes.

"Q Were you affiliated with some other doctor there in your office or just you alone?

"A Just me.

"Q Was the office equipped with furniture and different professional equipment?

"A Yes.

"Q And who owned the furniture and the professional equipment there?

"A I did."

Page 7, line 13 to page 8, line 2:

"Q Were you affiliated with any institutions?

"A Freedmen's Hospital and Howard University.

"Q In what capacity were you associated with Freedmen's Hospital?

"A Clinical instructor.

"Q Could you elaborate on that a little?

"A Well, clinical instructor. I was teaching the students; on the staff in the Gyn Service at Freedmen's Hospital."

"Q You had a regular class that you taught; is that right?

"A That's right.

39 "Q What subject did you teach?

"A GYN and OBS.

"Q This was in the Howard Medical School?

"A That's right. When I left school they had an opening."

Page 8, line 10, to page 8, line 14:

"Q You say you were on the staff of the hospital?

"A That's right.

"Q What does that mean?

"A Well, I am one of the attendants on the GYN and OBS staff there -- or was."

Page 10, line 17, to page 12, line 15:

"Q Now, were you a member of any organizations?

"A Namely -- you mean medical groups?

"Q Any type of organization.

"A Yes, I belong to the Medical Society.

"Q What society is that?

"A Medical Chirurgical.

"Q Is that a national or local organization?

"A That is local.

"Q Confined to the District of Columbia?

"A Yes.

"Q Any other organizations you are a member of?

40 "A District Medical Society.

"Q Are there any others that you can think of?

"A Fraternity, Chi Delta Nu.

"Q That is a national organization?

"A That is a national. Is that enough?

"Q Any more?

"A That's about all. That is all I can think of, of importance.

"Q You don't belong to any other organizations?

"A Probably so. I don't think of anything right now. If you can name them I will say Yes or No.

"Q I don't know.

"A National Medical Society.

"Q What is the official name of that ?

"A National Medical Society.

"Q Where is its headquarters?

"A It moves with the president. It is the negro National Medical Society. They have no definite headquarters.

"Q Do you belong to any organization like reading clubs, things like that?

"A Yes. I belong to the Daniel Hele Williams Reading Club.

41 "Q Is that a local organization?

"A Yes, local.

"Q How long has it been functioning?

"A I don't know. Long before I went into practice.

"Q Made up just of physicians?

"A Just a group of men. It is just a group of men. We meet once a month. It is not that important.

"Q Were you an officer in any of these organizations, or any other organizations you can think of --

"A I have been an officer.

"Q -- at the time that you left in 1955?

"A I was Chairman of the Board of Censors of the Medical Chirurgical Society -- on the Board of Directors of the same group.

"Q Any other official positions?

"A No, I don't think so."

Page 13, line 22, to page 14, line 6:

"Q Now, where did you live before you left in 1955?

"A Where did I live?

"Q Yes.

42 "A 1233 Kearny Street.

"Q In the District of Columbia?

"A That's right.

"Q That is Northeast?

"A That's right.

"Q How long did you live there?

"A Since 1945."

Page 14, line 20, to the end of the page:

"Q At the time you left did you owe an indebtedness on your home or on your personal property in your home?

"A I don't think any personal property. I owed the notes on the home.

"Q And to whom did you owe that note?

"A Perpetual Building Association."

Page 17, line 9, to page 19, line 6:

"Q At the time you left did you have any business affiliations here in the District of Columbia?

"A With the Empire Diaper Linen Service, Inc.

"Q And what was your connection with that?

"A I am President of the concern.

"Q You were President at the time you left?

"A Yes.

43 "Q As President were you chief executive officer?

"A Yes.

"Q And what were your principal duties as President?

"A Without being facetious, that of President.

"Q Actually, what did you find your chief duties were as president, not in theory, but as it worked out?

"A Signing certain papers that had to go through, as President; that was it, mainly. My brothers managed the plant.

"Q Did you have any control over the disbursement of firm money?

"A Oh, yes.

"Q What control did you have?

"A I would have to sign the checks; my signature had to be on checks.

"Q Did you sign all checks solely?

"A No.

"Q Did you merely countersign?

"A No; it took the signatures of two persons, myself and my brother.

"Q But no check was authorized unless it contained your signature?

44 "A Two signatures.

"Q And your signature had to be on there?

"A My signature was one of them, yes. The other point that I might add, as President, is that it was through me that most money was borrowed there, through my name. All big financial transactions were always done through my name.

"Q These big transactions which you refer to, you were charged with the responsibility of handling them personally; is that right?

"A To get it clear, for instance, if the firm needed a certain

amount of money, let's say for the sake of argument, a thousand dollars, with my standing here in the community, which is much better than that of my brothers, as a physician, I could go into American Security Bank and get that amount of money without a co-signor, or Industrial Bank and other places, and various equipment I could sign for on the basis of my signature alone. That is what I mean -- and which they couldn't do. I am sure they couldn't."

Page 20, line 2, to page 21, line 12:

"Q Now, just when did you leave Washington in 1955?

45 "A The latter part of August.

"Q You don't recall the specific date?

"A The 26th, 27th; something like that. I don't remember just what date.

"Q What was your destination?

"A I went to Arkansas.

"Q You went directly from Washington to Arkansas?

"A Yes.

"Q What location in Arkansas?

"A Hot Springs, Arkansas.

"Q Had you made any arrangements for living in Hot Springs, Arkansas, before leaving Washington?

"A I wrote for a reservation at a place, yes.

"Q And where was that?

"A 234 Garden Street.

"Q 334?

"A 234 Garden Street.

"Q And what is that; what is that at that address?

"A It is a -- a woman takes in persons who come to the city of Hot Springs; she has a number of rooms there--a rooming house, more or less a hotel rooming house.

46 "Q What is that woman's name?

"A Mrs. Carey.

"Q Did you know her before you wrote to her?

"A No, I didn't.

"Q What arrangements did you make before you left here, with her?

"A I wrote and made reservations at her place.

"Q For what duration?

"A No duration. I sent her a check and just made a reservation like you make at any hotel.

"Q You sent her a check, you say?

"A I must have. Yes, I am sure I did.

"Q In what amount?

"A I don't remember. Probably $25; something like that."

Page 23, line 9, to page 26, line 15:

"Q You had never been to Hot Springs yourself personally?

"A No, I had corresponded with Hackney when he was there. His wife was sent from there to here for me to treat and I delivered her children. He was stationed there at the time. I had known James Hackney for 30 years or more.

47 "Q Now, before your departure had you made any arrangements for employment in Arkansas?

"A Other than I had my license. I obtained a license. I made provisions to obtain a license in Arkansas and I got a medical license after I got there.

"Q What provisions had you made before you left Washington?

"A I wrote to the Secretary of State and I had my prerequisites transferred from the District to Arkansas.

"Q When was that done, Doctor?

"A It was done some time in August.

"Q Of 1955?

"A Yes, 1955.

"Q Is that the only provision that you made so far as employment or practice was concerned before you left here?

"A That's right.

"Q How did you travel to Arkansas?

"A By train.

"Q And what did you take with you?

"A What do you mean?

"Q I mean in terms of personal effects and luggage, and that sort of stuff.

48 "A That's it. Personal effects and luggage.

"Q I believe you said that you had never been in Arkansas, had never personally been in Arkansas before.

"A Yes, I had been in Arkansas, but --

"Q When?

"A I don't know. Some time in the early 40's. I had traveled through Arkansas. I had seen Arkansas. I had never been there to stay. It was a matter of traveling through.

"Q Just passing through?

"A That's right. I have been in Memphis with a friend of mine on several occasions, and we had been over to Arkansas several times.

"Q What is the longest period that you would say that you were in the state of Arkansas prior to 1955, at any one time?

"A Probably 24 hours; or something like that. I was in Memphis. You just go across the Mississippi River into Arkansas.

"Q Had you ever been to Hot Springs before?

"A Never.

"Q Now, when you left in 1955, was the furniture and equipment removed from your office at 1209 Q Street?

49 "A My personal instruments -- state your question again.

"Q Now, when you left in 1955, was the furniture and equipment removed from your office at 1209 Q Street?

"A Not when I left. I packed the instruments and things that I had sent later, some instruments and things I knew I would need.

"Q Was the furniture ever removed from there?

"A No, it wasn't.

"Q Do you have any heavy equipment in that office, such as X-ray machines, and that sort of stuff?

"A No, no X-rays. The usual office equipment.

"Q Do you have one of those heavy things that you have the patient lie down on?

"A A table, yes.

"Q Was that ever removed?

"A No, none of that was removed.

"Q Now, it may not be possible for you to enumerate them all, but what type of equipment was it that you say you had packed up and sent to you?

50 "A I had things like my -- the usual small equipment -- blood pressure apparatus, bag.

"Q Small hand tools; is that right?

"A Yes; operating small equipment. I took a number of kits of operating equipment -- knives, scalpels, hemostats, blood pressure apparatus, things like that, that I could get in several trunks."

Page 30, line 13, to Page 31, line 4:

"Q You say that you had, prior to your leaving, made no arrangements for employment or for your profession activities in Arkansas, other than applying for a license.

"A Other than applying, and knowing that my -- I could obtain a license in Arkansas. I wrote to the Secretary of the Medical Board there, I guess, and I knew that my qualifications would be accepted in Arkansas.

"Q Had you corresponded with anybody in Arkansas with respect to the professional opportunities or employment opportunities there?

"A No; I knew several physicians there, I hadn't corresponded with them; I had had occasions to meet Collier, I hadn't talked even to him, in Hot Springs; I knew Hot Springs would be the place that I would want to go in the South; and I had learned that from James Hackney. That

51 I had learned years before this had ever come about, from talking to Jim."

Page 34, line 15, to page 36, line 13:

"Q When you left, was your furniture removed from the house?

"A Some of it -- they rented the furniture. They didn't have all

their furniture and they rented some of mine and some of the things I put in the basement.

"Q So all of your furniture remained in the house somewhere?

"A That's right -- most of it. Some of it my brothers took.

"Q What items did your brothers take?

"A Maybe some chairs. I don't know. To expedite time we can say that most of the furniture stayed there.

"Q Now, was the phone at your home taken out of your name?

"A No, that wasn't taken out of my name.

"Q Was the electricity in your home taken out of your name?

"A No. She was supposed to continue to pay the bill, which she didn't do. I came back and had that bill too.

52 "Q Was the gas taken out of your name?

"A No.

"Q How is your house heated?

"A By oil.

"Q Did you have an oil bill?

"A I sure did -- when I got back. They were supposed to take care of the oil bill and they -- the last month they didn't even take care of that. They bought oil and I had a bill -- very bad tenants.

"Q Where were you buying oil?

"A From the Henry Fuel Company.

"Q Has that account remained in your name?

"A Yes. They had stopped the oil when I got back. They hadn't kept up on the oil bill.

"Q Did you close out your District of Columbia bank accounts?

"A Yes, I did -- at the Industrial Bank.

"Q You closed that out before you left?

"A I did.

"Q And how about your other bank account, at the American Security and Trust?

"A I think I had about $45; I didn't close that out.

"Q Did you give that bank a change of address, ever?

53 "A Industrial Bank? I don't remember. I don't think I did.

"Q You say you don't think you did; you mean you don't think you gave the American Security a change of address?

"A No, I don't think I did.

"Q Did you sever your connections with Howard University and Freedmen's Hospital?

"A I did. I definitely told them that I was leaving."

If your Honor please, I have just noticed that that does cover a matter that we have stipulated.

THE COURT: That's all right. Very well.

MR. WADDY: Page 40, line 20, to page 41, line 9:

"Q How about the District of Columbia Tax Assessor? Did you notify him of a change of address?

"A Never thought about it. My taxes were paid.

"Q Do you recall when you arrived in Arkansas?

"A Yes. I think it was the last day of August. I must have left here about the 26th. It was either the last day, or the first day of September. It was just about that time, I know.

"Q Where did you go to live when you arrived?

54 "A 234 Garden Street.

"Q Was that Mrs. Carey?

"A Carey, that's right.

"Q I believe you said you were a roomer there?

"A I was. I had a room there, yes, sir."

Page 44, line 11 through line 16:

"Q How long did you live there at 717 (Pleasant Street)?

"A From November up until the middle of January.

"Q That would be the 15th of January?

"A Some time about that time, yes.

"Q And where did you move to from there?

"A Into Washington, D. C."

Page 53, line 11, to page 54, line 23:

"Q Now, when were you last in Arkansas?

"A About the middle of January.

"Q 1956?

"A That's right.

"Q When you left Arkansas, you moved from 717 Pleasant Street?

"A That's right.

"Q Did you file Federal income tax returns for the years 1955, 1956, and 1957?

55 "Q Where did you file those returns?

"A I filed the returns after I came back here --

"Q What collector did you send them to?

"A Baltimore.

"Q For all three of those years, 55, 56 and 57?

"A Yes, surely.

"Q Did you file an income tax return for those three years of 1955, 1956, and 1957, other than Federal income tax returns?

"A What do you mean? Specifically what are you talking about?

"Q What income tax returns other than Federal income tax did you file?

"A Whatever income taxes you have to file, I filed. I am still lost. I don't know of any other. It is the usual Federal income tax.

"Q I mean, other than Federal, did you file any local income tax returns?

"A Yes. The usual records, and things, yes.

"Q Where did you file those?

"A You mean the District income tax?

"Q Did you file a District income tax?

56 "A Yes.

"Q For the years, 55, 56, and 57?

"A Yes.'

"Q Did you ever file any Arkansas income tax returns?

"A No, I didn't. I came back before. I didn't have any income out there anyway. They owed me money."

Page 67, line 18 to page 68, line 16:

"Q Where are you presently living, Doctor?

"A 1233 Kearny.

"Q You have been living there since your return?

"A I have.

"Q And your office is in the same location it was when you left?

"A It is, yes.

"Q I believe you testified earlier, did you not, Doctor, that the furniture and equipment in your office was never removed from there, except for the little hand --

"A Furniture and some of my equipment, quite a bit of my equipment I took with me.

"Q The qequipment -- you took some instruments, small hand instruments?

"A Yes. I didn't carry any big things which required freight.

57 I took a lot of little things.

"Q The big equipment and furniture was never removed from your office.

"A Was never removed, no.

"Q When you returned to Washington, did your mother come to live with you again?

"A Yes, after I returned.

"Q She is living with you now?

"A Yes, she is."

Page 79, line 15, to page 80, line 4:

"Q Doctor, have you resumed your teaching activities at Howard?

"A Yes, I have.

"Q When did you resume them?

"A I believe in -- this year. I didn't take on any teaching activity when I came back, not until this present year, this year, 1956--56-57.

"Q And you are teaching the same subject, are you?

"A I am in the same department.

"Q You are not teaching the same subject -- or are you?

"A Well, you ask the question 'subject' -- it's the whole field. I am teaching in the --

"Q You are teaching in the same area?

58 "A Yes, that's what I said; the same department."

Page 80, line 17, to page 81, line 1:

"Q Have you resumed your position on the staff of Freedmen's Hospital?

"A Yes. I am a clinical instructor. I took that on as of last year too.

"Q Did you have to go through any formality or any procedure to retain those positions?

"A No other than to tell the chief that I wanted to take my position back again. In the fall of the year I told them that -- in fact he came to me and asked me if I would take it over. I was going to ask him."

* * * *

59 HARRY J. ROBINSON

was called as a witness by the plaintiff, and being first duly sworn, was examined and testified as follows:

60 * * * *

DIRECT EXAMINATION BY MR. WADDY * * *

Q. Mr. Robinson, are you the owner of premises 1209 Q Street, Northwest? A. I am.

Q. Do you know a Doctor James E. Roberts? A. I do.

Q. Does Dr. Roberts have his office in the basement of those premises?

THE COURT: I thought that was all in the deposition, was it not?

MR. WADDY: No, sir -- that is in the deposition; I don't mean to be repetitious, but I am bringing out something else from this witness.

BY MR. WADDY:

Q. Was there a written lease between you and Dr. Roberts?

A. There was.

61 Q. Do you recall when that lease was made? A. In May, 1941.

Q. Do you have that lease with you? A. I do.

Q. Will you produce it, please.

* * * *

BY MR. WADDY:

Q. Mr. Robinson, this paper is dated February 20, 1941. Were you in error in testifying in May or-- A. I was in error testifying in May. This is the lease.

* * * *

MR. WADDY: We call the Court's attention to the fact that this lease is dated February 20, 1941, and was to run for a period of fifteen years.

62 BY MR. WADDY:

Q. Directing your attention to the summer of 1955 did there come an occasion when certain repairs were made to the doctor's offices at 1209 Q Street, Northwest? A. Yes.

Q. Do you recall what time of the summer those repairs were made? A. To the best of my knowledge it was either in June or July.

Q. Do you know how those repairs were financed? A. Yes.

Q. How were they financed? A. They were financed by a note taken out at the Industrial Bank.

Q. Who signed that note? A. I did.

Q. What were the circumstances under which you signed that note? A. I signed it with the understanding that Dr. Roberts would pay the note off.

THE COURT: With what understanding?

THE WITNESS: That Dr. Roberts would pay the note off.

BY MR. WADDY:

Q. Did Dr. Roberts pay that note off? A. He did.

63 Q. Do you have the cancelled note with you? A. Yes, here it is.

MR. WADDY: We would like to offer in evidence as plaintiff's Exhibit No. 5, FHA note payable to Louis A. Johnson, Inc., and call attention of the Court to the fact that that note was made in August, 1955, and was paid off in August, 1957 -- payment was completed in 1957.

THE COURT: It may be admitted.

* * * *

BY MR. WADDY:

Q. Directing your attention further to the month of October, 1955, did you have occasion to talk to Dr. Roberts about that office? A. October, 1955?

64 Q. August, 1955. A. Yes, I did.

Q. In that conversation was it near the latter part of August? A. To the best of my knowledge it was.

Q. Did the doctor in that conversation indicate to you in any that he was giving up his office? A. Yes, he did.

Q. In what way did he make such indication? A. He said that he was giving up the office, giving up his practice, and was going to leave town; he didn't know just where he was going, but he was going to leave town, and I would hear from him later.

Q. Did you enter into any agreement with him concerning the cancellation of his lease? A. No, I did. not.

Q. Was there any discussion about the cancellation of his lease? A. No, not to my knowledge.

* * * *

65 HARRY J. ROBINSON,

the witness on the stand at time of adjournment, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. WADDY:

Q. At the time you held your conversation with Dr. Roberts in August, 1955, did he express any uncertainty as to his future plans? A. Yes, he did.

66 Q. Did he indicate where he was going? A. No, he didn't.

Q. Did he ever indicate to you where he was going? A. No.

Q. You recall when he returned to Washington, do you not? A. Yes.

Q. Did he make payment for rent for the entire period that he was absent from Washington? A. When he came back he picked up the usual payment, but since that time he has paid some months doubly to pick up for the time he wasn't there.

THE COURT: Don't let your voice go down; we all must hear you.

BY MR. WADDY:

Q. Is it your testimony that rent has been paid for the period that he was absent? A. Yes.

THE COURT: Did he pay rent for the time he was absent?

THE WITNESS: After he came back -- not while he was away.

THE COURT: Not for the time he was away?

THE WITNESS: He did not pay while he was away.

THE COURT: Who paid the rent?

67 THE WITNESS: No one.

THE COURT: You collected no rent for the time he was away?

THE WITNESS: That is right.

BY MR. WADDY:

Q. But it is your testimony that he did pay upon his return, did he not? A. Yes.

MR. WADDY: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. HAYES:

Q. Mr. Robinson, with respect to the last question asked you, when Dr. Roberts came back is it a fact that he paid you for storage on the furniture in the home? A. When he came back he paid the usual monthly fee and some months after that he paid twice or more for the time that he had been away, for the storage of the things there.

Q. And it was paid to you expressly for the storage of the things while he was away, is that right? A. That is right.

Q. And during the time he was away he paid you nothing? A. I collected no rent while he was away.

Q. You are the brother-in-law, I believe, of Mrs. Roberts?

68 A. That is right.

Q. And when Dr. Roberts left, Mr. Robinson, did he have any signs or anything on the place before he left? A. Yes, he did.

Q. And what is anything was done with respect to the sign on the place indicating his occupancy of the premises as a physician? A. His

name had been taken off, and there was a notice on the door saying the office was closed; for the patients to go to some other doctor -- I forget the name of the doctor.

Q. Did the notice, sir, suggest, that any patient should go to Dr. Simmons or Dr. Gill? A. I think those are the names. I know they were directed to go to two other physicians.

Q. And his name was removed from the door? A. Yes.

Q. Did that situation continue to exist until the time that he returned in, sometime, I believe you said, in January or February? A. Yes.

Q. With respect to the work that was done in the place, Mr. Robinson, can you tell me when that work began? You say it was in the summer of 1955? A. It was either in June or July, some time along there; I don't recall. To the best of my knowledge I think it started in June.

69 Q. And was that in the early part of June or is that your recollection as to when it was? A. Some time in June. It may have been the early part but I think it was in June that it started.

Q. Do you know, sir, as to what the nature of those repairs was? A. Yes.

Q. What was it, sir? A. Some repairs that should have been done long since; baseboards rotted; door frames; plastering.

Q. Was it a fact that termites had gotten into the place and the baseboards and partitions were rotted? A. Yes.

Q. And had you all discussed it much prior to the time of June when the work was begun? A. Yes, we had.

Q. And he had indicated his intention to have the work done? A. Yes.

Q. You have indicated that he paid for that? A. Yes.

Q. Is that, sir, in keeping, sir, with what the doctor has done with the occupancy of your premises? Had he paid for the work being done in the part of the premises he occupied? A. He has paid for all

70 repairs and the work being done down in his office. I have never paid for any of those things.

Q. Mr. Robinson, with respect to after the time that he came back, has he ever attempted to renew the lease which has been offered in evidence, which expired in February, 1956? A. We have talked about a renewal of the lease but nothing has been done at all.

Q. So that presently nothing has been done since the time he has returned so far as any renewal of the lease is concerned? A. That is right.

Q. Prior to the time of the doctor's coming back, had you received any communication from him? Did he indicate to you where he was? A. Yes, I received communications from him and they came from Hot Springs, Arkansas.

Q. Did he indicate to you as to how he was engaged in Arkansas? A. Yes, he told me that he was practicing in a hospital there; he had taken up work there.

Q. Just prior to Dr. Roberts' return had you made any steps or did you undertake to rent the place? A. No, I didn't.

MR. HAYES: That is all.

71 REDIRECT EXAMINATION

BY MR. WADDY:

Q. Did Dr. Roberts state in that communication as to whether he was returning? A. No, he didn't.

Q. When he returned he went back in the same property? A. Yes, he did.

Q. And has paid you rent for it ever since? A. Yes, he did.

MR. WADDY: That is all.

(Witness excused.)

* * * *

THE COURT: I am going to ask counsel to come to the bench.

(At the bench:)

THE COURT: Gentlemen, I want to pursue for a moment some of the things I said to you at the bench at the opening of this case.

In a case such as this, of course, the moral consequences to the parties are very serious.

For example, if the plaintiff prevails, defendant's wife would be branded as an adulteress, and that's a pretty serious matter. On the other hand, the plaintiff hasn't lived with her husband for years prior to the separation. It isn't as though he pulled up stakes and left her and went to this other woman -- that would be different. If she prevails in
72 this action I don't suppose they will resume living together again. I don't suppose she wants to.

MR. WADDY: Well, she wants to.

THE COURT: I was going to make this suggestion. You were willing to make some sort of adjustment, Mr. Hayes, but not go quite as far as I am going to suggest. Why not convey her outright one half in that property, making her a tenant in common? Would you be willing to? -- or better yet, a joint tenant, and then she would have a right of survivorship.

MR. WADDY: Personally, I would, but as her attorney I would not.

THE COURT: My thought was if she was given a half interest as a joint tenant she would have a right of survivorship.

MR. HAYES: We will give her that.

MR. WADDY: We will not accept it.

THE COURT: Do you want to mention it to her?

MR. WADDY: I will certainly mention it to her.

THE COURT: I think you had better mention it now.

Of course, I can understand how a woman who considers herself wronged would feel; there are sentimental feelings involved. Would she take her husband back even though they haven't lived together for twelve years?

73 MR. WADDY: She would take him back; she wants him back, and she says that's all she is fighting for. She says this woman broke her home up.

THE COURT: Of course if she prevailed she may get the property back but she won't take him away from the other woman.

MR. HAYES: There is not the remotest possibility of these people going back together.

MR. WADDY: She says she feels there is going to be a time when he will have a change of heart and come back to her arms.

MR. HAYES: She said that twelve years ago.

THE COURT: The only thing I suggest as a possibility, have the defendant convey a half interest in the property as joint tenants and then she will have a right of survivorship.

Suppose you go talk to her now.

MR. WADDY: Very well, Your Honor.

(At the bench.)

MR. WADDY: There is something I don't like to inject into the issues, but I am repeating her words. She says she stands on principles; they are her religious principles and she thinks she has been wronged and she feels he will come back to her.

THE COURT: Well, that is her privilege.

* * * *

74 LeROY F. CLARK

was called as a witness by the plaintiff, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WADDY:

Q. Will you state your name? A. LeRoy F. Clark.

Q. Where do you live? A. Silver Spring, Maryland.

Q. Where are you employed? A. C & P Telephone Company.

Q. Is that the telephone company that has the portion in the District of Columbia? A. Yes.

Q. You were directed by subpoena to bring the records concerning telephone HObart 2-7733. Have you brought those records? A. I have.

Q. Will you consult those records and tell us in whose name HObart 2-7733 is listed? A. James E. Roberts.

Q. Would your records indicate there how long he has had that

75 number? A. Yes. Our records show since September 15, 1941.

Q. Will your records also show where that telephone is located? A. At 1209 Q Street, Northwest.

Q. Directing your attention to August 1955, do your records show that there was any instruction given to the company concerning that telephone? A. Yes. We have an order to suspend the service of this number, and that was done August 28, 1955.

Q. Now, Mr. Clark, you have used the term "suspended". In connection with your company what is the meaning of the term "suspended?" A. Well, that is a service we offer the public -- it is more or less a temporary services -- especially designed for people that are going on vacation or that have no need for their telephone for a period not to exceed a year, and they get this service at a discounted rate, and it is convenient, and they don't have to reapply for service if they return to the city.

Q. And do they pay for that service during the entire period of suspension? A. Yes, they are rendered a bill each month.

Q. Did there come a time when this period of suspension ended?

76 A. Yes, the service was restored on January 13, 1956.

Q. Was the same number used that was used at the time of the suspension? A. Yes.

Q. And did this suspension hold that number for the entire period? A. Yes.

* * * *

CROSS EXAMINATION

BY MR. HAYES:

Q. Would your records disclose, sir, if the original application that had been made was made for a discontinuance of the service? A. No, I don't have any record saying it was, for the discontinuance of the service.

Q. Did you personally handle this particular case? A. No, I didn't.

Q. And you have said, sir, it is the custom of your company to try to sell this type of service to your patrons. Do you have any knowledge as to whether or not in this instance there was the attempt at discontinuance and this suggested service came from your office? A. Well, it is

possible. People call in and they usually ask for the service to be suspended. Some don't know about this type service and we ask them if they

77 plan -- how long they will be out of the city, and so forth.

Q. And if as a matter of fact there were a discontinuance of service, a request for discontinuance, and a doctor was making that request, is it the custom of your company to call his attention to the possibility of the sale, in the event his business goes to some other hands, that the keeping of this number might be an asset? A. Well, it is possible. Of course they try to establish that the person will return to the city, or to that effect.

* * * *

DR. JAMES E. ROBERTS,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYES:

Q. Give His Honor your full name and address, please.

78 A. James Roberts; 1223 Kearny Street, Northeast, Washington, D.C.

Q. Doctor, addressing your attention, sir, to the latter part of August, 1955, did there come a time approximately then that you made arrangements to and did leave the District of Columbia? A. Yes, there did.

Q. Will you tell His Honor as to what occasioned your doing that and what you did to carry out your intention of leaving this jurisdiction? A. After June of that year I found myself, because of things that had happened that year, slipping very much in my practice. I am a surgeon, and I found that my decisions were not quite what they should be, and in general my whole life was being upset and unhappy, and I knew that I likewise on several occasions was actually probably even drinking too much, and I realized some change had to be made; I knew I wasn't keeping up in my work or anything else, and I felt something had to be done, and my thought was to change to another environment and probably collect myself and get to the cause -- I had to.

Q. Did you have any particular place in mind, sir, to which you intended to go, and if so, tell us why you did intend so to do. A. The place that I knew most about was Hot Springs, Arkansas. I knew that
79 because in 1949 one of my best friends was stationed there at the hospital. He knew at that time of some of the trouble I was having.

He also knew that Hot Srpings, Arkansas, had only one colored surgeon there, and he wasn't well. The man's name was James Hackney, and Hackney tried in every way to get me to come to Hot Springs. We were very close friends and had been for years.

He outlined to me that there were two seasons there, during the hot water season when the negroes come to Hot Springs for hot water baths and then the big money making season was in December during the horse racing season, and with that in mind I decided on Hot Springs.

Q. And what did you do to close out your business on this end? A. Well, I talked to the two physicians that I referred my practice to, and told them that I was leaving; that I would not be back, and I had every intention of going away and practicing in another town, I told them why.

Q. And who were those two physicians? A. Dr. Coleridge Gill and Dr. Thomas Simmons. Both of them are gynecologists. I am a gynecologist and obstetrician.

Q. What did you do with respect to your office? A. Out of my office I took all of my small equipment and put it into grips and cases, and my large equipment I knew that it wasn't worth even taking away.
80 First of all, being a gynecologist I do quite a bit of cancer work. The table is inadequate but I am not able to get a small one. The other was second-hand equipment when I bought it, and certainly to pay freight all the way across to Arkansas wasn't reasonable.

Q. Did you take such equipment as was necessary and aside from what you indicated was impractical, for you to take, did you take that with you? A. Yes.

Q. What did you do with respect to notice to the public as to your intention to leave this jurisdiction? A. I told as many of the business people that I had direct contact with, where there was a note to be paid, or something. I made my brother counsel or attorney --

Q. Power of attorney? A. Power of attorney, and had him to handle all the bills, and so forth.

I have three brothers and we are the owners of the Empire Diaper Linen Service, and he is the manager there, and I made him power of attorney to take care of my business here.

Q. Were you connected with a hospital in anywise? A. I was. I was clinical instructor at the hospital and on consultation there.

81 Q. And what if anything did you do with respect to that? A. I went to the head of the service and told him I was leaving the city for good and that they would have to reappoint somebody in my place for the year. They had already made up the schedule so it did actually create quite a --

Q. But you were replaced by someone at that time? A. I was replaced, and they divided my classes among the other men.

Q. At the place where your office was kept did you do anything there to indicate that you were leaving the city? A. I had my sign taken down -- that I took with me -- and I put a notice on the door telling the patients that I was referring them to both Dr. Gill and Dr. Simmons.

The cases that I had pending for surgery, and so forth, and obstetrical cases, and particularly those that were Caesarean sections, I contacted them personally and told them I was leaving and they have to select one of these doctors.

Q. Did you make arrangement to go to Hot Springs prior to the time of your getting there? A. Yes. Mrs. Hackney is now living in the city; her husband by the way is dead, and I spoke to her about the possibility of hotels, and so forth, in Hot Springs. She said she didn't know too much about the place now but she had a friend there and she wrote to this

82 particular gentleman and the friend then communicated with me and said she had made arrangements for me in one of the hotels there.

Q. As a result of that did you send a check to Hot Springs? A. Yes, I did.

Q. I show you this, sir, and ask you as to what it is.

If Your Honor please, I have shown this to Mr. Waddy in a conference which we had on yesterday, at your suggestion.

MR. WADDY: As a matter of fact, we are willing to stipulate that he did go to Arkansas and lived in this lady's home as a roomer, and thereafter in another place.

MR. HAYES: And may I then as a part of that stipulation, because I have here some checks which are drawn on the Arkansas Trust Company -- I think Mr. Waddy also in that conference agreed that he would stipulate that Dr. Roberts when he went there opened a bank account in Arkansas.

MR. WADDY: That is correct.

MR. HAYES: And I have a number of checks all of which are written on the Arkansas Bank and which I will be glad to offer in evidence, based on the stipulation which Mr. Waddy has indicated he is willing to agree to.

THE COURT: Very well. Are you offering them in evidence?

83 MR. HAYES: Yes; I am putting the whole batch in as one exhibit.

(The checks heretofore referred to marked and received in evidence as Defendant's Exhibit No. 1)

BY MR. HAYES:

Q. Did you make any arrangements, Doctor, to engage in practice in Arkansas? A. Yes. Before I left here the last of August I wrote to the Secretary of the Medical Board there and had a reciprocity taken out to the District of Columbia; that was in the latter part of August.

Q. As a result of that, sir, did you subsequently get a certificate authorizing you to practice in Arkansas? A. Yes, I did, and it took from then until the 30th of November before the certificate was issued to me.

Q. And you had begun the attempt to get this in the latter part of August? A. That is right.

Q. And the certificate came to you in November? A. Yes, that is it. I was assuming that it would be a few weeks, as it is here in the District, getting reciprocity, but there they sent it to a number of different men all over the state.

Q. You finally, however, did obtain this certificate authorizing

84 you to practice? A. That is right.

Q. As a result of this did you undertake to practice in the state of Arkansas? A. Yes, I did. I was working all along before that came. I was working there with one of the doctors, just helping out before the certificate came through.

Q. And before the certificate came though did you make any other contacts? A. Well, I was in the hospital there. I attended all the Medical Society meetings and I took an active part in the OB clinic there, and went to the hospital, and I was very welcomed and admitted to the hospital. As a matter of fact I had more formal training than the men who are there, even white fellows.

MR. HAYES: I would like to offer this. This is among the matters that have been stipulated with Mr. Waddy.

THE COURT: It may be admitted.

(Certificate of Dr. James Roberts to practice medicine in the State of Arkansas marked and received in evidence as Defendant's Exhibit No. 2.)

BY MR. HAYES:

Q. When you first went there, Doctor Roberts, where did you go, sir? I mean, where did you go to live? A. It was a hotel, more or less.

85 Q. And did you subsequently change your place of abode? A. Yes. The first of November, or thereabouts, I obtained an apartment, two bedrooms, living room, kitchen and dinette.

Q. And did you have any service installed in the new quarters to which you went? A. My telephone was put there and registered there as Dr. James E. Roberts.

Q. I have shown you, sir, the certificate to which you have just testified.

I show you this communication, sir, and ask if that is the communication which accompanied that. A. Yes, it is.

MR. HAYES: I would like to offer this. This too is by way of stipulation with counsel.

MR. WADDY: No objection.

THE COURT: It may be admitted.

(The document referred to was marked and received in evidence as Defendant's Exhibit No. 3)

BY MR. HAYES:

Q. I show you this, Doctor, and ask you what this is. A. It certifies I have registered in the state of Arkansas for the year 1956.

MR. HAYES: If Your Honor please, I want to offer this and refer
86 to it as a certificate of registration showing that the fee was paid for the year 1956.

THE COURT: It may be admitted.

(Certificate of registration for 1956 marked and received in evidence as Defendant's Exhibit No. 4.)

BY MR. HAYES:

Q. I show you this and ask you what this is. A. This is my occupational tax. They have a tax on physicians in the city of Hot Springs. I went to this particular place when I obtained my license and the person in the Bureau told me the year was so nearly over would I come back at the end of the year, and I did get back there and they had a week of vacation there and this came through on January 10th.

Q. And at that time you did pay your occupational tax for the city of Hot Springs? A. That is right.

MR. HAYES: I will offer this in evidence.

THE COURT: It may be admitted.

(Occupation tax, City of Hot Springs, Arkansas, marked and received in evidence as Defendant's Exhibit No. 5.)

BY MR. HAYES:

Q. Did you become a voting resident of Arkansas? A. Yes. I paid poll tax in Hot Springs, Arkansas, and all taxes.

87 Q. You say you paid the poll tax? A. I paid the poll tax and all taxes.

Q. After you obtained your divorce in Arkansas I think shortly after you got the divorce you married. A. That is true.

Q. Did your wife live there with you? A. She lived there, yes, sir, in the apartment with me.

Q. And for how long a time did you live in the apartment? A. I lived there from the first of November until I left on January 13th.

Q. And during that time, sir, you did engage in the practice? A. I did, yes.

* * * *

88 Mr. Waddy has been good enough to call attention to myself that on these proceedings which he has offered in evidence the Doctor's poll tax is a part of it. I was attempting to get it in the record through his wife, and I appreciate the suggestion from counsel because that applies specifically to the Doctor himself.

THE COURT: Very well.

BY MR. HAYES:

Q. Doctor, did you receive communications while you were there from persons in the District to whom you had given your address? A. Yes, I did, from the hospital and several former interns of Freedmen's Hospital, of which I am an officer and treasurer, I told them and I told as many persons as I could think of. Some of the men I wanted to come here, because there were checks, and my mother was still here, and of course expense went on.

Q. Doctor, I show you -- these invoices, Your Honor, are being offered to show that he received mail, because there was some suggestion as to whether he let people know where he was, and I wanted to offer it for that purpose as well.

89 MR. WADDY: I have no objection.

MR. HAYES: One from Howard University Medical Alumni Association.

THE COURT: I suggest they be marked as one exhibit.

MR. HAYES: That is what I am going to do, the four of them, with Your Honor's permission.

(Four envelopes were marked and received in evidence as Defendant's Exhibit No. 6.)

BY MR. HAYES:

Q. I show you this and ask you what this is. A. This is my voting absentee, from Arkansas, in the last Presidential election.

MR. HAYES: If Your Honor please, Mr. Waddy says that he will admit that this is a communication with the County Clerk of Hot Springs. The envelope is all I can offer because the ballot has been returned. I offer it together with the Doctor's testimony that in here was enclosed what?

THE WITNESS: The absentee ballot.

THE COURT: Does that show he voted?

MR. WADDY: No, sir.

MR. HAYES: His testimony is to the effect that he voted.

THE COURT: In what year?

MR. HAYES: This is October 23, 1956, if Your Honor please.

90 THE COURT: But he was back in Washington at that time.

MR. HAYES: He was back in Washington and this was sent to him as an absentee.

THE COURT: In other words, he voted by mail.

MR. HAYES: That is correct.

THE COURT: Have you voted this year?

THE WITNESS: No. I paid my poll tax this year.

THE COURT: There was an election this year. Did you vote this year?

THE WITNESS: No, I didn't. I paid the poll tax there, though.

BY MR. HAYES:

Q. Doctor, after the time that you and the present Mrs. Roberts were married did you adopt a child? A. Yes.

MR. WADDY: If Your Honor please, I am going to object.

THE COURT: Objection sustained.

MR. HAYES: If Your Honor please, may I make my proffer?

THE COURT: Well, of course you have a right to make a proffer--the rules provide for it--but the only issue for me to determine is whether he obtained a bona fide residence in Hot Springs or whether he went there for the purpose of establishing a technical residence for the

91 purpose of getting a divorce.

MR. HAYES: I think it would have probative value though to show that he and his wife began adoption proceedings in that jurisdiction.

THE COURT: Oh, it was in that jurisdiction?

MR. HAYES: Yes.

THE COURT: Oh, I thought it was in Washington and after his return.

MR. HAYES: Oh, no.

THE COURT: I will overrule the objection.

BY MR. HAYES:

Q. Will you tell us whether you did take steps there to adopt a child? A. Yes. My wife brought a child there that she had taken when it was three days old and when she got to Hot Springs, Arkansas, I saw the attorney on the 12th of December, at which time we made arrangements to start the adoption.

THE COURT: Would you mind repeating your question?

MR. HAYES: I asked Dr. Roberts as to whether or not he took steps there in Arkansas to adopt the child.

THE WITNESS: Yes, I did, on December 12th.

BY MR. HAYES:

Q. And you engaged an attorney for the purpose of doing that?

92 A. That's right, I did.

Q. I show you this check and ask you as to what this represents? A. This represents the attorney's fee that I retained at that time.

MR. WADDY: I object to the admission of the check; it shows nothing but a check made payable to somebody.

MR. HAYES: I submit, if Your Honor please --

THE COURT: There is no offer on the record.

MR. HAYES: I offer it.

MR. WADDY: I object to it because the check simply shows the payment of money to somebody with no indication as to what it was for.

THE COURT: That may affect its probative value but not its admissibility. Objection overruled.

(Check for $100 marked and received in evidence as Defendant's Exhibit No. 7)

BY MR. HAYES:

Q. As a result of the steps there taken, Doctor, did there come a time when the child was actually adopted by you and your wife? A. Yes. All of the proceedings were carried out in Arkansas.

Q. And what then happened, sir? A. Then because the child was delivered in the city of Washington these papers were sent to

93 Washington, and this is usual procedure in this thing, and Washington issued a birth certificate and then sealed all of the previous records.

Q. So that the records in our court will show the procedure as having been begun and prosecuted in Hot Springs.

MR. WADDY: I object.

THE COURT: Objection sustained. What the record shows must be determined by the records and not by what the witness says.

MR. HAYES: The doctor has indicated that these records are sealed records.

THE COURT: They are sealed records but if they were relevant the Court could unseal them for a specific purpose.

MR. HAYES: Then I would ask Your Honor, because we have the certificate of birth in the Washington area, that Your Honor would unseal them.

THE COURT: I don't see the importance. I would have no hesitancy in ordering them to be unsealed provided it was any important matter.

The only relevant thing is that he started a proceeding while he was in Arkansas in this court to adopt a child.

MR. HAYES: No, Your Honor. He started the proceedings in Arkansas -- not in this court -- but in the court there to adopt a child.

94 THE COURT: Well, there was also a proceeding in this court.

MR. HAYES: No. The proceedings in Arkansas were sent to this jurisdiction and the final certificate of birth is issued in the name of the Doctor and his wife in our jurisdiction. The papers that will show it

was begun in Arkansas and processed in Arkansas are in a closed file.

THE COURT: Those are the only significant facts. What is in the files is not material.

MR. HAYES: No, Your Honor, that is correct.

THE COURT: That is sufficient.

MR. HAYES: May I offer this certificate?

THE COURT: It may be admitted.

(Birth certificate marked and received in evidence as Defendant's Exhibit No. 8.)

MR. WADDY: For the record I would like to object to the admission.

THE COURT: Objection overruled. I am going to let each party make its case. You know, this is not a jury trial.

BY MR. HAYES:

Q. Doctor, there was a suggestion made that you had certain repairs done to the office before you went. Will you tell us, sir, as to what happened with respect to these repairs and how they were occasioned?

95 A. Some time during the spring of the year, or earlier, I showed Mr. Robinson that the termites had gotten into the woodwork around there. As a matter of fact they had been there a couple of years before and I had paid two or three hundred dollars. They had eaten a large portion of the baseboard and a closet and some of the door casings, and there was a lot of general work that needed to be done, and I asked him if he would have it done and I would pay for it as -- I had paid for all bills since I had been there in 1941.

Q. And this work you say was some time in the spring? A. We discussed it in the spring and it was completed in July and the note came through in August.

Q. After you went to Arkansas there came a time when you returned to our jurisdiction. Will you tell His Honor the conditions under which you returned and why you returned to our jurisdiction. A. Well, the first thing that made me have to come back here was that particular year in Arkansas there was a bill before the legislature there to close

our horse racing, and the city of Hot Springs depends, as I said before, largely upon horse racing. That is what most people there depend on, that and the hot water season. The hot water season was over; I missed most of that because I didn't have my license there, and this particular year with the bill being before the Legislature there, by the

96 first of December in most years the trainers and racers and numbers of people come to the city and the city increases its population from 29,000 to a visiting population of for the year to 100,000, but this particular year because of this bill, business was very bad. Actually I was seeing patients without making any money; I wasn't even getting $100 a month there, and I had to do something with all my expenses, to meet my wife's illness--

THE COURT: I think you have answered the question.

MR. HAYES: If Your Honor please, I wanted --

THE COURT: I think you ought to make questions specific instead of inviting a long story.

MR. HAYES: I shall be glad to do that.

BY MR. HAYES:

Q. You indicated something with respect to the practice. What was the condition of your practice there?

THE COURT: He has already answered that.

BY MR. HAYES:

Q. Did you have any other reason for coming home? A. The other reasons were my expenses here, as I said, I had --

THE COURT: Don't say "as I said;" I don't want any repetition. Don't tell us the second time.

THE WITNESS: Another thing, in July of that year, Mr. Waddy had told me that if I didn't pay his bill he would turn my damn soul around,

97 and I knew he wasn't kidding about that.

And in addition to that, my mother who has lived with me for a number of years, is a hypertensive and she had convulsions that year; my brothers had written me about that, and then there was the matter of the business which my brothers are a part of, and they were having

some time with the administration of the business, and of course they had written to me about it, and I knew that unless I came back to that or helped them in some way that the administration of that business was going to fall down.

Q. I show you this and ask you what this is. A. This is a letter from my brother Henry on January 1st telling me about the business conditions here at the Empire Diaper Linen Service.

MR. WADDY: I think the letter is the best evidence.

THE COURT: Don't tell us what the letter says.

MR. HAYES: If Your Honor please, I want to offer the letter in evidence.

THE COURT: There is no objection?

MR. WADDY: No objection.

THE COURT: It may be admitted.

(Letter, January, 1956, together with envelope marked and received in evidence as Defendant's Exhibit No. 9.)

98 BY MR. HAYES:

Q. Your commenting about your mother calls my attention to another circumstance. When you left was your mother living with you? A. Yes, she was.

Q. What did you do with respect to the home in which your mother and you were living? A. I talked to my brother about it and I thought Mother was going to stay--

MR. HAYES: Don't go into the conversation, Doctor.

THE COURT: Doctor, you are an educated gentleman with a trained mind. Please listen to the questions and just answer the questions.

THE WITNESS: I will try to answer.

BY MR. HAYES:

Q. Will you tell us what you did with the home? A. I put it in the hands of my brothers to rent with the thought that my mother would stay there.

Q. Was the house rented? A. It was.

Q. And to whom was it rented? A. Mrs. Greenwald.

Q. And did your mother continue to live in the home? A. She lived there for a while and then she went to live with my brother in about a month or so.

99 Q. At the time when you returned was Mrs. Greenwald still there as an occupant? A. She was a very poor tenant and she got a couple of months behind and my brother asked her to move, and the house was empty until about two weeks or a month before I got back.

Q. What happened with respect to your furniture during the time your house was under rental? A. Mrs. Greenwald had rented some of it -- had used some of it; the other was stored in the basement and some of the furniture my brothers took with them.

Q. When you went to Arkansas, Doctor, was it your intention to remain there? A. Definitely. I still like the place.

THE COURT: Just answer questions, please, sir.

BY MR. HAYES:

Q. Was it your intention to remain there and to engage in the practice out there? A. Definitely so.

Q. Doctor, among the things with which you are associated was the Board of Censors of the Medical Society? A. Yes, sir.

Q. And what, sir, was your position with the Board at the time you left and went to Arkansas? A. Chairman of the Board of Censors.

100 Q. And what did you do with respect to that position? A. I resigned from that position.

MR. HAYES: That is all.

* * * *

102 DR. JAMES E. ROBERTS

resumed the stand and testified further as follows:

REDIRECT EXAMINATION

BY MR. HAYES:

Q. Did you have a conversation with the telephone company, Doctor, with respect to your telephone? A. Yes.

Q. Will you tell His Honor what that was? A. The day that I

called down to have my telephone cancelled, the lady at the telephone company asked me what I was going to do, and I told her I was planning to leave, and the conversation went on to the effect, how long have you had this telephone, and I said since 1941, and she said that telephone is a very valuable thing; do you plan to sell your business, and I said Yes, and she said with a letter it is possible for you to let someone else use that telephone, but I had no intention of doing that.

MR. HAYES: That is all.

* * * *

104 RULING BY THE COURT

THE COURT: The Court finds as a fact that the defendant did not make a bona fide change of residence, and that his leaving the District of Columbia and acquiring a technical residence in Arkansas was done solely for the purpose of establishing a means of getting a divorce. Consequently, since the matrimonial domicile was in the District of Columbia, since both parties had been residents of the District of Columbia right along, and since the defendant was not personally served with process in the action in Arkansas and did not appear at that trial the Arkansas court did not acquire jurisdiction, and therefore the divorce decree will be declared a nullity.

Declaratory judgment will be rendered for the plaintiff in accordance with the prayers of the complaint. Counsel will submit detailed findings of fact and conclusions of law and proposed judgment.

* * * *

[Filed February 17, 1958]

107 PROCEEDINGS Monday, January 6, 1958.

THE CLERK: Roberts versus Roberts.

THE COURT: I set this down for oral argument because of the unusual importance of the issues involved in this case to the respective parties.

As I indicated before, this is more than just a question of whether somebody should pay some money to somebody else.

MR. HAYES: May it please the Court, I want to thank your Honor for allowing us to have this oral argument, because I agree with your Honor that there are involved in this case issues which we feel are very important as far as both parties to this litigation are concerned.

The one thing your Honor, which I attempted unsuccessfully to impress upon your Honor at the time of the hearing, and which I am going to again attempt to call to your Honor's attention, is that as we conceive it the entire line of testimony does not admit of the inference which your Honor presumably drew from the testimony, and I say "presumably" because of the fact that, as your Honor will know, the only witnesses that were offered on the part of the plaintiff were the landlord and the gentleman from the Telephone Company.

And with respect to the landlord there is significant testimony had by him which I want to call to your Honor's attention. It is on page 64 of the transcript of the record had in this cause.

108 THE COURT: The record has not been finished.

MR. HAYES: May I read it and then hand it up to your Honor?

THE COURT: Yes, indeed.

MR. HAYES: Calling your Honor's attention to Page 64 and about three or four lines down: "Did the doctor in that conversation indicate to you that he was giving up his office?"

"Answer. Yes, he did.

"Question: In what way did he make such indication?

"Answer: He said he was giving up the office, giving up his practice, and was going to leave town. He didn't know just where he was going but he was going to leave town and I would hear from him later."

I call your Honor's attention to that language, because as I say, aside from this witness and the witness from the Telephone Company, the plaintiff apparently saw fit to and did rely upon the deposition taken of Doctor Roberts and what he seems to refer to as admissions made in that deposition.

I have examined, if Your Honor pleases, each of the cases that

counsel for the plaintiff has suggested to your Honor. It happens one of them was a case in which I was personally involved and took to the Court of Appeals. There is not a case, if Your Honor pleases, so far as I have been able to find, that has anything like the precedent from the factual
109 point of view that your Honor has before you in the Roberts case.

In each of the cases that has gone to the Court of Appeals there has been on the very face of the record itself a showing that the person was not giving up his residence in the District of Columbia; nor was he as a matter of actual fact intending to establish residence in the place to which he went, whether it were Florida or Arkansas, whichever the case might have been.

In each of those instances, for instance the Huggs case, the one to which I referred and was myself involved, there was a showing that a person got a leave of absence for a certain period of time, went to the jurisdiction, got the divorce, remarried, extended his time while he was there for the purpose of his business in which he was engaged, and the Court sees fit to say the business was merely to go there to get a divorce.

The Roberts case, throughout the entire record, there is a showing that this man -- I respectfully suggest to your Honor -- did actually first of all give up his relations here in the District with the full intention of going to Arkansas and making that the place of his residence.

Your Honor will remember that he was engaged here as an instructor in the school; that he was connected with Freedmens Hospital. Now he indicated to your Honor that he resigned those positions.

110 The testimony shows that he said he went to the person who was in charge and indicated that he was leaving and gave up the work.

Your Honor took the position at the time that we presented to you the findings of fact, that you would not allow the use of the word that he resigned, because your Honor didn't think that there was sufficient showing of a formal resignation. But whatever that might be, your Honor did say you would find the fact that he did give up his work.

He did give up his work, and the record will show as an instructor he went back -- not when he came back in this jurisdiction, somebody else took that job, he continued to work, and when the following fall term came he went back and asked whether or not he could be renewed in his position and he was renewed. The appointment was for a period of a year. He said the other man went in for a period of a year.

The record shows that he put a sign on his office indicating that he was leaving the jurisdiction; that he turned over his practice to two other physicians.

THE COURT: Well, I think we will suspend now for our mid-morning recess and we will let you continue after the recess.

MR. HAYES: Yes, sir. Thank you, your Honor.

(Short recess.)

111 THE COURT: You may proceed, Mr. Hayes.

MR. HAYES: I was attempting to call to your Honor's attention the things which in my opinion were evidence of the fact that the defendant Roberts actually intended to leave this jurisdiction.

I shall not repeat those, of course, which I have already called to your Honor's attention, about the giving up of his practice and the putting of the sign on the door and the turning over to the other people to whom he rented. He rented out his home, your Honor will remember, and rented it out as an unfurnished place, putting his own things and furnishings in the basement.

His mother was living with him and she went to live with one of the other brothers.

He took with him all of his small equipment. Now there was a suggestion that he left certain equipment there at the place. He testified without dispute that he left those things there because it would have been impractical for him to move the things because they were old and heavy and he would get new equipment at the place to where he went.

There was a question also about the telephone. Your Honor will remember that Mr. Waddy offered the telephone gentleman who said that he had suspended the use of his telephone.

I asked him as to whether or not his Company had attempted to get this man not to discontinue his service as he had attempted to do but
112 to continue it under certain circumstances.

Your Honor will recall that he testified that he did make the application for discontinuance and the suggestion was made to him, by the Telephone Company, that it would be to his advantage if he was leaving and there might be a possibility of disposing of his practice, that it would be an asset to keep it as a suspended service rather than a discontinued service.

There was a certain suggestion with respect to repairs in the place. He testified that was in accordance with an arrangement he had over a long period of years.

THE COURT: Mr. Hayes, I remember the testimony very clearly, so I am not going to trouble you to go over the testimony merely for the purpose of recalling it to my mind.

MR. HAYES: My purpose, if your Honor pleases, in doing that, is because I think the case has turned on the fact of whether or not, first of all, there was an attempt to leave, then as to whether or not the person acquires a new domicile in the place to which he goes by reason of the fact that he goes there with an intention of staying indefinitely.

There were certain things -- and I know your Honor is mindful of them -- but I simply say, to show them in support --

THE COURT: Proceed in your own way. I am only suggesting to you that if your only purpose is to remind me of the testimony, it is not
113 necessary.

MR. HAYES: I know your Honor too well for that. I know your Honor is perfectly mindful of the testimony that has gone before you, and particularly in this instance to which your Honor gave such careful attention.

But when he went into Arkansas, he first went into a hotel room. After he got there he gave up the hotel room and took an apartment. He had a telphone installed in this apartment.

Before he left our jurisdiction he made an arrangement to practice in Arkansas, got leave to practice; that leave was subsequently granted

after he got into the jurisdiction and he did, he associated himself with a physician in the other jurisdiction and practiced in the hospital there in Arkansas.

He opened a bank account there. He registered as a voter there. Your Honor will remember that he made one non-resident vote. He did not vote at the last time of voting but indicated that he had gotten a notice with respect to it.

He initiated an adoption proceedings there which was finally settled in our jurisdiction.

Now if your Honor pleases, I call your Honor's attention if I may to two decisions that have come down in our Municipal Court of Appeals. I wouldn't attempt to suggest these upon your Honor too strenously, knowing the difference as far as jurisdiction is concerned.

114 THE COURT: Well, I have a very high regard for the Municipal Court of Appeals.

MR. HAYES: Yes. Not only that, if your Honor please, that is supported by the fact that now these matters are all solely within that jurisdiction.

THE COURT: Well, that would not affect me. But I do have a very high regard for the ability of the members of that Court, and I shall be very glad to consider them not as controlling, of course, but as worthy of serious consideration.

MR. HAYES: Yes. I have read with interest, and I am sure your Honor will, the case of Adams versus Adams, -- it just came down. It was decided on the 16th day of December, 1957. And with respect to this question of residence, the suggestion, or this language was used: "A mere floating intention to return to the District at some future time would not prevent the acquisition of a new domicile."

They go on to indicate the question of a new domicile is the question of intent.

Again, in the case of Jones versus Jones, 2059, and decided December 5th of the year just passed, there is this language, which I think is also significant.

In Stevenson versus Stevenson, D.C. Municipal Appeals, 134, this Court said: "The requisites for establishing a new domicle is, one,
115 physical presence; and two, an intent to abandon the former domicile and remain here for an indefinite period of time."

Then it continues: "A new domicile comes into being when the two elements co-exist."

THE COURT: I think you do not have to labor that point. It is a perfectly correct statement of the law. After all, the question is one of fact.

MR. HAYES: I think that your Honor is a hundred per cent -- my respect for your Honor makes me say -- right that it is a question of fact. I think it is my burden to impress upon your Honor that, with the obligation upon the plaintiff, as it was, to show that there was not a bona fide residence, that there wasn't such a showing, because of these things which I have urged upon your Honor. Because of the fact that, I respectfully say to your Honor, there isn't one scintilla of evidence in this case which would lead to any other inference unless it be that your Honor was impressed with the fact that after the divorce was had, that these parties married and that it was perfectly apparent that among the things that he had in mind when he went into this jurisdiction, was to get a divorce.

I make no pretence to the contrary, with respect to that.

But if your Honor please, I call your attention to the fact that in
116 our jurisdiction that is not a reason why this divorce should -- I mean why this application -- should not have been denied. Because our courts have taken the position that if, as a matter of fact, there was a bona fide establishment of residence, the fact that there was an intent to get a divorce does not preclude the person from going forward.

The Goodlaw versus Hawks case, which is at 72 Appeals at Page 289, I will read the language if your Honor will allow it:

> "That leaves only the question whether appellee by moving to Virginia acquired a Virginia domicile. Neither the fact that she went there motivated by desire to obtain a divorce, nor the fact that she left some time after securing it, forecloses this

issue. If it can be said that she had at one time during her residence there an intention to remain for an indefinite period."

Now if your Honor pleases, I say to your Honor respectfully that there unquestionably was in the mind of Doctor Roberts the intention to remain there for an indefinite period.

It is a fact, as this case says, that he had in mind to get a divorce; that that was a part of the motivation with respect to it. But having established a residence there, the fact that that was a motivation, the very fact that he carried that intent into fruition, does not alter the fact that having actually established a residence there that this does not fore-
117 close him, as the language of the case says.

THE COURT: May I see the case?

MR. HAYES: Yes, your Honor.

THE COURT: I have no doubt that, of course, if a person changes his domicile, if he actually consummates a change, and that one or even the sole motive of making the change is so as to put himself in a position to get a divorce, that that latter circumstance does not prevent the change of domicile. But the question is one of fact, whether he intended to abandon his District of Columbia domicile and whether he intended to acquire domicile in Arkansas.

MR. HAYES: Yes, your Honor. That was a matter which your Honor had to determine from the factual situation which is before you.

My position with respect to that is this; that with the testimony as it was in this case, as I see it, if your Honor pleases, the only theory upon which your Honor could say, "Well, I don't believe that he intended, first, to leave, nor that he intended to make his domicile there," would be to say "I just don't believe what this man says."

I don't think that your Honor has a right, respectfully, to do just that.

I was looking around for language that I might say to your Honor, because of my concern, and fortunately I found your Honor's own language,
118 which I want now to call to your attention, in the case of O'Boyle versus Coe, which your Honor is of course familiar with. Your Honor

gave this language, which I would like to adopt in urging it upon you, because I think it is important.

Your Honor said -- and this was a question of where there was an administrative body, as your Honor will notice, and you were saying: "Well, you just cannot arbitrarily do something."

You said: "The administrative discretion, however, is not unlimited nor unbridled. It must be a sound legal discretion. Whether a dispensation should be granted is not a matter of grace but must be determined on legal principles. In a democratic society the acts of government officials" -- and your Honor of course, as a Judge, would consider yourself included --"are not based on grace but upon established principles of law. In fact, the regulation here involved expressly formulated certain standards to guide the actions of the Board. The Court may set aside an action of the Board if it finds that the decision was arbitrary or capricious."

I was concerned when I found those words. But your Honor gives me the leeway again, because you say: "It is hardly necessary to mention that the words arbitrary and capricious in this connection are not used in their popular sense, and have no opprobrius connotation. In their technical legal significance an administrative action not supported
119 by evidence or lacking a rational basis is deemed arbitrary and capricious."

Now I respectfully say to your Honor that your Honor can take this record which we have had now printed, and which I would like to leave with your Honor if you see fit to take it, your Honor can look in that record, your Honor can go over the testimony had, your Honor can take the deposition, and I respectfully say to your Honor that there isn't any line of that testimony which your Honor can take as a basis, nor from which the inferences may properly be drawn with respect to it, which would give a foundation upon which this could be done, unless, as I say, your Honor were to say, "I just don't believe you," and your Honor has said that you don't do that because that is arbitrary and capricious.

THE COURT: I have seen the witnesses and I can judge from their demeanor and appearance and way of testifying as to whether they impress me as truth-telling individuals or not.

MR. HAYES: All right. Excepting that the only witnesses appearing before your Honor was a witness produced by the plaintiff who was a landlord. I have called your Honor's attention to the fact that the significant thing about his testimony was that the man told him that he was giving up his work, he was giving up his place, he put the signs on his door and the like.

120 The other gentleman from the Telephone Company of course, your Honor, there was nothing about that where the question of his appearance would have anything to do with it. The only other witness was the defendant himself.

Now, Mr. Waddy indicates that he is relying upon these admissions made by him.

I respectfully suggest to your Honor there was nothing about the defendant's appearance, there was nothing about his manner of testimony which isn't corroborative of what the record itself shows, and which would in any sense tend to show anything other than what I have just said, your Honor, and that that is admittedly he desired to get a divorce.

Your Honor has just said and the records and the cases will bear out, that if as a matter of fact he bona fidely gave up here and went there with the idea of living there for an indefinite period, is not a foreclosure.

Your Honor has been very gracious in allowing me this length of time, and I respectfully suggest to your Honor that in the ends of justice that this situation should be corrected.

Your Honor will remember that these people have not lived together for a period of twelve years. There has been no cohabitation between these people, not even the usual amenities that would go usually. They have lived separate and apart. The question of relationship between

121 them is entirely out of the picture.

Your Honor will also know that in this instance this person did not come in saying "I want to be relieved of certain financial situations."

He wanted to come in accord with what the law in our jurisdiction has turned out to be.

Back there in the old days, it was different. The new rules came in with the idea that marriages which had ceased to exist in fact should not be kept up with the semblance of the law and therefore lend themselves to things that are improper.

In this instance, if your Honor pleases, these people have not only not lived together for a period of twelve years, this man is remarried --

THE COURT: Of course, I cannot consider that, Mr. Hayes, because I cannot decide this case that way. I have to decide whether there was a bona fide change of domicile from the District of Columbia to Arkansas. If there was, I have to determine the issue in favor of the defendant, irrespective. If there was not, I have to determine the issues in favor of the plaintiff.

MR. HAYES: I agree with you, your Honor. But sometimes the Court sitting in these matters, the question of good conscience comes. We approach it from an equitable point of view.

122 THE COURT: Mr. Waddy, you may proceed.

MR. WADDY: May it please the Court, I think that with respect to the case in which Mr. Hayes just read, and your Honor decided, your Honor did exactly what you had indicated in that case was the proper way to approach these questions: that is, to listen to conflicting evidence and determine the weight of that evidence and where the inferences lie on the basis of what the evidence is.

Now the interesting thing about this case with respect to the evidence is that we used -- and very advisedly so -- the deposition of the defendant in this case, in which he has admitted to various things that he did which are inconsistent with a change of domicile.

We proceed upon the theory that once the domicile of the parties has been established by the evidence, that domicile remains until the defendant shall show evidence of a bona fide change of domicile.

The Court will recall that it was stipulated in this case that the domicile of both of these parties was the District of Columbia. Therefore, if there was a change of domicile, that change of domicile must have taken place between at least June 15, 1956 and the time that he left in August of 1956. Because the law of the District of Columbia that Mr. Hayes talks about on June 15, 1956, was that this man was not entitled to a divorce. The Court of Appeals had handed down its decision or

123 opinion so holding.

Now the evidence on the question of his intention to give up his District of Columbia domicile we submit is most inconclusive. He left all of his heavy equipment here. He took his hand equipment with him; and in addition to that, he went to a place that he had never visited before.

The evidence shows that he had never been in Hot Springs, Arkansas.

It shows, also, that he made no inquiry of anyone concerning the medical opportunities in Arkansas. He did testify that some years before he had talked with a man by the name of Hackney. So that, in going to Arkansas, we fail to find under these circumstances any true evidence of a change of domicile. And his activities in Arkansas certainly do not indicate a change to remain there, or an intention to remain there.

He testifies as to his medical practice. The evidence shows that he got his license to practice in Arkansas on November 30, and that he stayed there only until January 13, 1957.

As we think and look at the entire picture here, we find, one, that since the domicile was the District of Columbia, that since the evidence of a change of domicile is, shall we say, inconclusive and at most conflicting, that the Court exercised its jurisdiction to weigh that evidence and to draw the proper inferences to determine what the real fact

124 was in this case. And that fact was that he never intended to give up his District of Columbia domicile nor to acquire a domicile in the State of Arkansas.

MR. HAYES: May I say just a few concluding words, if your Honor pleases?

My friend suggests that there were inconsistencies in the testimony. I ask him to point them out, because I am unable to find them.

He says there was no inquiry made. I think the record will disclose that this man talked to this friend of his some years previously; that this place had been pointed out to him as a nice place to go, that the races were there.

He went on to explain that the fact that the races had been foreclosed from operating at that particular time was one of his reasons for leaving the jurisdiction, because the practice didn't hold up.

Now my friend points out the fact he didn't get his license to practice until November 30th. The significant thing with respect to intent is that he made the application for that license before he left this jurisdiction, and called attention to the fact through the routines through which it had to go; that it had to be round-robin, and therefore the application was not acted upon until sometime in November.

125 Now this animus manendi, this intention to remain, I respectfully suggest to your Honor there was every showing of his intention to remain. I will not repeat myself with respect to that.

I say the record fully discloses, I suggest, and every line of testimony, and I say there are not inconsistencies in it. If your Honor with all of this before you says it is inconclusive and you are not convinced, of course we have to bow to that situation as your Honor's finding.

I think I have said that the record in this case will not give your Honor any such basis.

126 RULING OF THE COURT

THE COURT: The Court is not unmindful of the gravity and importance of the issues of this case, not only to the parties to this litigation but to the second wife.

The Court has weighed the evidence very carefully, and has again considered it. The Court takes the following view of the evidence: Namely, that the defendant did not intend to abandon his domicile in the District of Columbia; and that he did not intend to acquire a domicile in the State of Arkansas.

Naturally, a person does not frankly admit an intention that might react unfavorably to him. The Court necessarily takes into account the circumstantial evidence; and ordinarily, and so it is in this case, circumstantial evidence is much more reliable than partisian statements of parties to the litigation, knowing that their statements might be called into question at some future time.

Now among the circumstances -- and the Court is not going to mention all of them, but only a few familiar ones -- that led the Court to the inference which it has drawn, are the following: The defendant left the District of Columbia and immediately upon his arrival in Arkansas took steps to get a divorce.

A few weeks after obtaining the divorce he returned to the District of Columbia. He had no difficulty in getting back his home, even though
127 he had temporarily rented its accommodations to somebody; he had no difficulty in immediately resuming his connection with the hospital on whose staff he had been a member. If he had actually formally resigned his connection he would have had to presumably make an application for reinstatement, and some formal official action would have had to be taken. But he immediately stepped back and resumed where he left off a couple of months previously.

True, he did make some inquiries, in Arkansas as to the possibilities of establishing a medical practice there. His inquiries apparently did not elicit favorable responses. It may well be that if he had found opportunities to practice medicine in Arkansas he would have changed his domicile and remained there.

But the point is that he was still in a formative state at that time. He had not abandoned his District of Columbia domicile. He came to the conclusion that there were no opportunities in Arkansas and promptly returned not only to the District of Columbia but to his former house in the District of Columbia and resumed his activities as though he had been away on a vacation.

It is this series of circumstances that lead the Court to infer, together with other circumstances which would prolong this discussion

too much to mention, that lead the Court to the inference that when the defendant left the District of Columbia he did not intend to abandon the
128 District of Columbia domicile, and that when he arrived in Arkansas he did not intend and never acquired a domicile in Arkansas.

The case of Goodloe versus Hawk, 72 Appeals, D. C. 287, presented an entirely different situation. In that case the person whose divorce decree was challenged left the District of Columbia and acquired a residence in Alexandria, Virginia, in July 1924. In October 29, 1925, considerably over a year later, she filed suit for divorce in Alexandria. She did not receive a divorce until February 20, 1926. It was then a divorce a mensa e thoro, and it was not enlarged to an absolute divorce until September 1926.

The Court in that case held that the party in question had acquired a residence in Virginia; and the Court of Appeals sustained that finding.

The facts in the case at bar are entirely different. Moreover, the question of intention is a question of fact which must be decided on the evidence in each case, and necessarily findings based on the evidence cannot be based on precedents.

Accordingly, the Court will adhere to its former ruling, and will deny the motion for a new trial.

* * * *

PETITION FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Colu...

FILED OCT 24 1958

Joseph W. Stewart
CLERK

No. 14,367

JAMES E. ROBERTS,

Appellant,

v.

GLADYS S. ROBERTS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COBB, HOWARD AND HAYES

GEORGE E. C. HAYES

HERBERT O. REID

613 F Street, N. W.
Washington, D. C.

Attorneys for Appellant

Of Counsel:

Julian R. Dugas
George H. Windsor

613 F Street, N. W.
Washington, D. C.

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 14,367

JAMES E. ROBERTS,

Appellant,

v.

GLADYS S. ROBERTS,

Appellee.

PETITION FOR REHEARING

Appellant, by his attorneys, petitions this Court to grant a rehearing in the above-entitled cause, and upon such rehearing and further consideration to reverse its opinion rendered herein on October 9, 1958, and dismiss this cause of action; or, failing in that, to modify such opinion dated October 9, 1958, and reverse the judgment below. In support of this petition appellant stated the following grounds upon which he relies:

I. THE COURT BELOW ERRED IN ITS FINDINGS AND CONCLUSIONS, AND THIS COURT HAS MISCONCEIVED ITS FUNCTION OF REVIEW IN REGARDS TO THESE FINDINGS AND CONCLUSIONS, AND HAS FAILED TO CORRECT THE ERROR BY ITS AFFIRMANCE.

(a) The Court Below Erred In Its Findings and Conclusions.

(b) This Court Has Misconceived Its Function of Review In Regards to the Findings and Conclusions of the Court Below.

II. THE COURT BELOW ERRED IN NOT ACCORDING FULL FAITH AND CREDIT TO THE PUBLIC ACTS, RECORDS, AND JUDICIAL PROCEEDINGS OF ARKANSAS.

(a) The Certificate of Marriage and Arkansas Divorce Decree.

(b) The Arkansas Decree of Adoption.

III. THIS ACTION OUGHT TO BE DISMISSED BY THIS COURT FOR LACK OF JURISDICTION.

(a) There was absent here a case or controversy,

(b) Indispensable parties are not joined in this action, and

(c) If the absent parties are determined by this Court not to be indispensable, nevertheless, this Court ought to dismiss this action in the exercise of its discretion under 28 U. S. C., Section 2201.

ARGUMENT

I.

THE COURT BELOW ERRED IN ITS FINDINGS AND CONCLUSIONS, AND THIS COURT HAS MISCONCEIVED ITS FUNCTION OF REVIEW IN REGARDS TO THESE FINDINGS AND CONCLUSIONS, AND HAS FAILED TO CORRECT THE ERROR BY IT'S AFFIRMANCE.

a.) The Court Below Erred In Its Findings and Conclusions

Based upon its findings of fact and conclusions of law, the Court below entered a judgment declaring (1) a decree of divorce entered December 7, 1955, in the Chancery Court of Garland County, Arkansas, in the case of James E. Roberts v. Gladys S. Roberts to be null and void, (2) and that the sole plaintiff herein, Gladys S. Roberts, is the lawful, undivorced wife of the sole defendant, James E. Roberts, (3) and that the interests and rights of the appellee in certain premises in the District of Columbia are unaffected by the said decree.

At the conclusion of the trial the Court ruled as follows:

> "The Court finds as a fact that the defendant did not make a bona fide change of residence, and that his leaving the District of Columbia and acquiring a technical residence in Arkansas was done solely for the purpose of establishing a means of getting a divorce. Consequently, since the matrimonial domicile was in the District of Columbia, since both parties had been residents of the District of Columbia right along and since the defendant was not personally served with process in the action in Arkansas and did not appear at that trial the Arkansas court did not acquire jurisdiction, and therefore the divorce decree will be declared a nullity." (J.A. 62)

During the oral argument on the motion for a new trial the Court below observed:

> "Of course, I cannot consider that, Mr. Hayes, because I cannot decide this case that way. I have to decide whether there was a bona fide change of domicile from the District of Columbia to Arkansas. If there was, I have to determine the issue in favor of the defendant, irrespective. If there was not, I have to determine the issues in favor of the plaintiff." (J.A. 72)

The Court below conducted this trial, made its findings of facts and conclusions of law, and denied the motion for a new trial upon the assumption that the issue before it was the validity of the Arkansas divorce decree and that determination it was free to make by hearing testimony and deciding whether there was a bona fide change of domicile from the District of Columbia to Arkansas. This construction itself makes the findings of facts and conclusions of law erroneous. Williams v. North Carolina (1945) 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577. In Hopson v. Hopson (1955) 95 U. S. App. D. C. 285, 221 F. 2d 839, 847, this Court stated:

> "It follows that there may be no necessity for a frontal attack upon the validity of the foreign ex parte divorce, though the circumstances surrounding its procurement may always be viewed as material equitable considerations. There are two important reasons why courts should seek to avoid such an attack. First, because

of the deference due to the proceedings of the sister state; and second, the result of the attack might well be to stigmatize unnecessarily a subsequent marriage and the children born thereof. Since the question of maintenance does not depend in each case upon the invalidity of the foreign divorce, sound judicial practice ordinarily will avoid a frontal attack upon such decree.

"Accordingly, the preferable procedure in the circumstances of the present case calls for its remand to the District Court for redecision under the principles set forth in this opinion. If the facts of the case permit the separate maintenance action to be entertained and decided without the court's reaching the question of the validity of the exparte foreign decree, the District Court should follow that course. If in fact and in law the foreign decree is invalid, the District Court is free so to decide, but only if it must.

"Reversed and remanded for reconsideration and redecision under the principles set forth in this opinion."

Putting to one side for the moment the question of whether an attack by the Court below upon the Arkansas decree was either proper or permissible, the entire record evidences at no point that the Court accorded any weight to the Arkansas proceedings, and decree. Where did the Court place the burden of proof here, and by what quantum was it to be discharged, are vital but still unanswered questions. In Esenwein v. Commonwealth (1944) 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608, the Supreme Court held that prima facie validity must be accorded the foreign decree, and that the burden is upon the litigant attacking the validity of the foreign decree. The burden upon the appellee was, to show, at least, by the preponderance of the evidence that the appellant was not in fact so domiciled. Cheever v. Wilson (1869) 76 U. S. 108, 9 Wall 108, 19 L. Ed. 604. Where the validity of a second marriage was brought into issue among claimants for certain property, the Supreme Court held the quantum to be "proof so clear, strong and unequivocal as to produce a moral conviction ..." Sy Joc Lieng v. Sy Quia (1912) 228 U. S. 335, 339, 33 S. Ct. 514, 57 L. Ed. 862.

The record in the instant case is void of anything better than conjecture and suspicion to support the findings that appellant lacked a bona fide domicile in the State of Arkansas at the time he instituted his action for divorce and obtained a decree there. The crucial concept here is the variable domicile. Domicile is always a conclusion of "ultimate fact" and "can be established only by proof from which, as experience shows, contradictory inferences may be made as strike the local trier's fancy." (Mr. Justice Rutledge dissenting in Williams v. North Carolina, supra, 245-246) Conflicting inferences may be marshalled either way, but ultimately conjecture is the outcome. Appellant would like to marshall again what the Court below found and relied upon in its findings and during its ruling denying the motion for a new trial as circumstances from which the Court drew its inferences.

1. The circumstances that appellant owned and occupied a home in Washington, D.C. and upon his departure rented the house, stored some furniture, maintained utilities in his name and returned to live there in January, 1956, (Finding of Facts 6 and 18, J.A. 13, 15), supported the inference that appellant did not intend to establish a new domicile in Arkansas. The Court does not concern itself with the character of the appellant's new abode except to observe that appellant went from Washington, D.C. to a hotel and later moved to a four-room apartment in Hot Springs, Arkansas. (Finding of Fact 12, J.A. 14) Maintaining his residence in the District does not conclude anything. Is one compelled to a forced sale, and immediately, because he wishes to change his domicile? Could he not permanently maintain a home here in the District of Columbia and maintain another one elsewhere? District of Columbia v. Murphy (1941) 314 U.S. 441, 62 S.Ct. 303, 86 L.Ed. 329. Many people have more than one home, some have none. Stumberg, Conflict of Laws (1951) p. 19-20. Goodrich, Conflict of

Laws (3rd Ed. 1949) p. 66. One may have a domicile though living in a lodging or boarding house. Emery Perkins v. Davis (1872) 109 Mass. 239; Emery v. Emery (1914) 218 Mass. 227, 105 N.E. 879.

The circumstances of the District of Columbia home, repairs in June to his office, interrupted office telephone service rather than disconnecting, recommencing the telephone service upon his return, resumption of practice and his medical school and hospital connections and employment, or the ease with which he returned to Washington and resumed his activities, supported the inference of lack of necessary intent to gain a new domicile. Failure to have visited Arkansas previously, failure to take an automobile with him, failure to make a change of address card in the local post office, with his mother living in Washington house and his family in and out of the house, failure to give a new address to the Building and Loan Company, maintaining a bank account in Washington, though opening one in Arkansas, continuing as President of a family laundry business, give further impetus to the inference of lack of intent.

But note that the Court concedes that while in Arkansas appellant "was still in a formative state at that time." (J.A. 75) "It may well be that if he had found opportunities to practice medicine in Arkansas he would have changed his domicile and remained there." (J.A. 75) Of course, there was no dispute that the appellant had been present in Arkansas, so as to satisfy the presence requirement of domicile. But the Court used aspects of his presence and conduct while in Arkansas as evidence of his intent. Inference was drawn from the length of time appellant remained in Arkansas. Stumberg, supra, p. 27, commenting on Williams v. City of Roxbury (1858) 78 Mass. 21, 12 Gray 21 and White v. Tennant (1888) 31. W. Va. 790, 8 S.E. 596 states:

> "Both of these cases are also apt illustrations of the fact that a determination of domicile of choice quite often depends as much upon the particular slant that a fact-finding body may take of the facts presented as upon the general rules that are assumed

> to be applicable. Proof of intent is always likely to be difficult where there is any doubt. The available evidence for proof of domicile may consist of declarations and conduct. From these the intention must be found. Frequently the evidence is equivocal and, consequently, there is often room for considerable difference of opinion as to whether upon the facts the necessary mental element exists. Indeed, the real difficulty in the domicile cases is usually not so much one of stating in general terms what the courts say but of predicting what they will do with doubtful situations, because of the effect upon the minds of the fact-finding body of the facts as presented."

The West Virginia Court held in White v. Tennant, supra, that where one living in West Virginia moved to Pennsylvania and unloaded his belongings, and because of sudden illness went back the same day to West Virginia that a Pennsylvania domicile had been established.

Once the Court below concedes that the appellant was in the formative state and had opportunities developed for him he would have remained, whether appellant ever formed the necessary intent for domicile, or whether having formed such intent abandoned it, or whether the necessary intent prevails today, are matters of pure conjecture and suspicion. Most people remain where they are intending to remain as long as they are successful or until better opportunities develop. It is sufficient if appellant intended to remain for "an indefinite future time." Goodrich, supra, p. 64-66; Klutts v. Jones (1916) 21 N. Mex. 720, 158 p. 490; Goodloe v. Hawk (1940), 72 U. S. App. D. C. 287, 113 F. 2d 753.

The Court below failing to give any weight to the Arkansas decree also fails to properly balance the conduct in Arkansas with that in the District. District of Columbia v. Murphy, supra.

Giving the evidence the fullest effect possible it is not clear and convincing proof as required by law. Williams v. North Carolina, supra; Esenwein v. Commonwealth, supra; Rice v. Rice (1948) 336 U. S. 674, 69 S. Ct. 751, 93 L. Ed. 957.

b.) This Court has misconceived Its Function of Review in regard to the Findings and Conclusions of the Court Below.

The Court stated in its per curiam affirmance of October 9, 1958:

> "We have carefully considered the transcript, as appellant has asked us to do. We are satisfied that appellant has failed to sustain his burden of persuading us that we should reject the findings and conclusions of the trier and substitute others favorable to him."

It respectfully appears to appellant that this Court has erroneously interpreted the "clearly erroneous" rule, or incorrectly applied it in this instance. (See: The Concurring Opinion by Chief Judge Stephens in Hopson v. Hopson, supra, p.849, suggesting that Rule 52(a) is applicable.

In an appropriate case where there is an appeal from a judgment challenging the sufficiency of the findings and the correctness of the conclusions, this Court will accord a presumption of validity which will stand unless shown to be clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.

> " That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it,

> the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., (1948), 333 U.S. 364, 394-395, 68 S.Ct. 525, 92 L. Ed. 1147.

The Court's function in the instant case, in reviewing the evidence, involves more than "appraising the significance of conflicting testimony." See: Graver Frank Mfg. Co., Inc. v. Lrude Air Products Co. (1949) 336 U.S. 271, 275, 69 S.Ct. 535, 537, 93 L. Ed. 672. To accord the findings and conclusions in the instant case, the weight they would have in equity without Rule 52(a) does not require the application of the "clearly erroneous" rule here because the findings of the Court below involved no question of the candor or credibility of witnesses. See: Broadcase-Music Inc. v. Havana Madrid Restaurant Corp. (1949) 175 F.2d 77, 80. The real problem here was the drawing of inferences by the Court from the evidence.

First, it is respectfully submitted that any presumption of validity of the findings and conclusions vanishes if ... "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., supra, at page 295. In the opinion of the petitioners, a mistake has been committed which this Court can not avoid by an application of the "clearly erroneous" rule.

Secondly, it is well-established that where the findings and conclusions are properly regarded as mixed questions of law and fact, this Court has a right to review the evidence and substitute its findings and conclusions for those of the District Court in the event this Court finds the record warrants such action. Bogadres v. Commissioner (1937) 302 U.S. 34, 58 S.Ct. 61, 82 L. Ed. 32; Roberts v. Roberts (1955), 95 U.S. App. D.C. 382, 222 F.2d 408.

Thirdly, the ultimate determination from the several elements in domicile is clearly one ultimately of law. It is clear that where the ultimate finding is a conclusion of law, such a finding is subject to judicial review. Bogardres v. Commissioner, supra.

It is submitted that the findings here were either mixed findings of fact and law, or conclusions of law. In Williamson v. Osenton (1913) 232 U. S. 619, 34 S. Ct. 442, 58 L. Ed. 758, there was certified the question of whether from a given state of facts it could be concluded for purposes of diversity of citizenship that the plaintiff had changed her domicile. Mr. Justice Holmes, for the Supreme Court, answered this question.

Though granted the concept "domicile" is a proper jurisdictional fact, in appropriate situations, a determination of domicile and as in the principal case, change of domicile, is a legal conclusion following from the existence or non-existence of certain facts. Gamewell Co. v. City of Phoenix, (1954) 216 F.2d 928, rehearing denied (1955) 218 F.2d 180.

It might be well to remember at this point, the observation of Mr. Justice Frankfurter, speaking for the Supreme Court in the second William's case, supra, p. 236.

> " State Courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact."

It is respectfully submitted that this Court can and should review the evidence giving proper weight to the Arkansas finding, placing upon the appellee the burden of proving the invalidity of the foreign judgment by that standard of proof required to overturn or disregard a judgment upon direct attack. See: Schneiderman v. United States, (1943), 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796.

The evidence measured by any quantum of proof does not justify invalidating the Arkansas decree and neither does it satisfy the appellee's burden in challenging a foreign decree.

II. THE COURT ERRED IN NOT ACCORDING FULL FAITH AND CREDIT TO THE PUBLIC ACTS, RECORDS AND JUDICIAL PROCEEDINGS OF ARKANSAS.

a.) The Certificate of Marriage and Arkansas Divorce Decree.

Most of the discussion under Point I is applicable here as to the Arkansas decree of divorce. The appellant respectfully submits, however, that this Court may reverse the judgment in the proper exercise of its appellate power in this equitable cause without reaching the level of constitutional compulsion. Worthley v. Worthley, (1955) 283 P.2d 19, 44 Cal. 2d 465.

If this Court does not agree, then the appellant's position is that the reasons set forth under Point I justify a reversal of the judgment under the Full Faith and Credit Clause of the Constitution. Constitution of the United States, Article IV, Section 1: Title 28, United States Code, Section 1738.

The Arkansas marriage has been completely bypassed by the court below with barely a mention of this public act and record of Arkansas. Granted the reasoning is that if the Arkansas decree of divorce is invalid the appellant is without capacity to contract a second marriage and hence the second marriage is void and of no effect. See: First and second Williams cases, supra. But the observation of Mr. Justice Black, dissenting on this aspect of the Williams case is entitled to reflection. Williams v. North Carolina, supra, 264-270. Is not this public record of Arkansas entitled to some respect even though it be granted that it may be held that the second marriage is void? It is submitted that the line of authority from the Supreme Court beginning in the concurring opinion of Mr. Justice Douglas in the Esenwein v. Commonwealth, supra, and continuing down to Vanderbilt v. Vanderbilt (1957) 354 U.S. 416, 77 S.Ct. 1360, that the marriage relationship is divisable, and credit will be given to the divorce and subsequent marriage where possible. Hopson v. Hopson, supra, is designed to accord a maximum of

respect to each of the various state interests as may be involved. Where a federal court fails to give full faith and credit to a decree of a state court, a federal question is raised, determinable by the rules of the Supreme Court developed in this area. Davis v. Davis (1938) 305 U.S. 32; Moore and Oglesbay, The Supreme Court and Full Faith and Credit, 29 Va. L. Rev. 557, 613-614 (1943).

b.) The Arkansas Decree of Adoption.

The record discloses here that the appellant and Mrs. Sylvesta R. Roberts secured an order of adoption from the Probate Court for the County of Garland, State of Arkansas, adopting Karen Sylvesta Roberts. This order is on file and sealed in this jurisdiction. (J. A. 57-58).

Pursuant to the District of Columbia Code the Commissioner caused to be issued a new birth certificate for Karen Sylvesta Roberts which was introduced at the trial. (J. A. 58) D. C. Code, Title 16, Section 223 provides:

> " (b) If the adoption occurred outside of the District either before or after August 25, 1937, upon filing with the Commissioners a certified copy of the final decree of adoption, the Commissioners shall cause to be made a new record of the birth in the new name and with the names of the adoptors and shall then cause to be sealed and filed the original birth certificate with the certified copy of the final decree of adoption, and such sealed package shall be open only by order of a court of competent jurisdiction."

Congress thus prescribed the mode and method by which a foreign adoption might be given full faith and credit in the District of Columbia. As the matter now stands part of the government for the District of Columbia has given credit to this foreign adoption with purportedly the following effect:

> "(a) A final decree of adoption shall establish the relationship of natural parent and natural child between adoptor and adoptee for all purposes, including mutual rights of inheritance and succession the same as if adoptee was born to adoptor. Such adoptee shall take from, through, and as a representative of his

> adoptive parent or parents in the same manner as a child by birth, and upon the death of an adoptee intestate, his property shall pass and be distributed in the same manner as if such adoptee had been born to such adopting parent or parents in lawful wedlock. All rights and duties including those of inheritance and succession between the adoptee, his natural parents, their issue, collateral relatives, and so forth, shall be cut off, except that in the event one of the natural parents is the spouse of the adoptor, then the rights and relations as between adoptee, such natural parent, and his parents and collateral relatives, including mutual rights of inheritance and succession, shall in nowise be altered." D. C. Code, Title 16, Section 222

The adoption in Arkansas was pursuant to Arkansas Statutes, Official Edition 1947, Vol. 5, Title 56-101, 56-102. Title 56-101 provides that husbands and wives must be joined as petitioners as they were in the instant case. (Such a provision is contained in D. C. Code, Title 16, Section 211). In considering the petition the Arkansas Court found the petitioners morally fit. Under the laws of Arkansas this could hardly have followed without finding them to be husband and wife. Title 56-102 requires that the petition be filed in the Probate Court where the person to be adopted resides. The Probate Court found that the adoptee was a resident of Hot Springs, County of Garland, State of Arkansas, residing with the petitioners. This then was a finding that the appellant was as of the 28th day of May, 1956, a resident of and domiciled in Arkansas.

The Court below did not even consider this decree and its findings so as to give them any credit. Again we ask, is a holding that the determinations are not binding, merely because the appellee was absent and not a party, also a holding that the determinations are of no effect? The present unfortunate posture of this domestic relations matter is that part of the District of Columbia has given effect to this foreign decree of adoption and until this action in equity the minor child was the legitimate lawful heir of the appellant. Now, after this declaratory suit, her status and that of her adoptive mother could not be more in doubt.

But more germane to the controversy is the situation where in one jurisdiction, credit once given has now been taken away by an equitable proceeding, achieving the consequence which this Court has sought to avoid; Hopson v. Hopson, supra, and the Court below apparently felt helpless to avoid.

It is respectfully submitted that the giving of proper credit to the Arkansas divorce decree and to the proceedings of domicile in the adoption decree would have avoided the chaos and confusion which now prevails in this matter, and would have protected the legitimate rights of the appellee.

III. THIS ACTION OUGHT TO BE DISMISSED BY THIS COURT FOR LACK OF JURISDICTION

a). There Was Absent Here A Case Or Controversy, and

b). Indispensable Parties Are Not Joined In This Action.

An examination of the transcript discloses the following facts:

1. The sole plaintiff, Gladys S. Roberts, the first wife of James E. Roberts, named,
2. James E. Roberts, the sole defendant,
3. In her complaint for declaratory relief, praying,
4. That the Court below would declare a judgment of a sister state divorcing James E. Roberts and Gladys Roberts null and void, and that
5. The foreign decree of divorce be adjudged uneffective as to certain real property held jointly with the defendant James E. Roberts, and that
6. The plaintiff Gladys S. Roberts be declared the lawful, undivorced wife of the sole defendant, James E. Roberts.
7. The plaintiff sought this declaration as to her status and other relief alleging among other things, that the defendant James E. Roberts upon securing the foreign divorce decree married in the divorce rendering state Sylvesta R. Robertson, and that the sole defendant James E. Roberts and Sylvesta R. Robertson both reside in the District of Columbia as man and wife at a residence known to the plaintiff.

8. The evidence was uncontradicted that James E. Roberts and Sylvesta R. Robertson subsequent to their marriage adopted in the rendering state of Arkansas a child born in the District of Columbia. (J. A. 55-58)

9. The jurisdiction of this District Court was invoked under District of Columbia Code, 1951, Title 11, Section 306, and 28 United States Code, Annotated, Section 2201, 2202.

10. The defendant answered admitting "the jurisdictional statement contained in paragraph 1 of the complaint, but

11. Prayed that the complaint be dismissed with prejudice.

12. The record shows (J. A. 22-24) that the court raised the question of jurisdiction to entertain this action for declaratory judgment, and concluded that it would entertain the action.

After the opening statements and prior to the first day's adjournment the Court began the colloquy, sections of which appears J. A. 22-24, thereby:

> THE COURT: I have another question about which I want both sides to think. As I read the pleadings and listened to the opening statements, there is a question in my mind as to whether this is a justiciable controversy and, if so, whether it is actualized. I should be glad to have you ready with authorities. (Tr. p. 13)
>
> THE COURT: I might say what I had lurking in my mind when I suggested the question to counsel was whether a declaratory judgment will lie to pass upon the validity of a marriage. The question in my mind is, where is the controversy. (Tr. p. 19)
>
> THE COURT: The question in the Court's mind is, are you not premature? (Tr. p. 22)

RULING BY THE COURT

> THE COURT: At the conclusion of the opening statements of counsel there arose a question in the mind of the Court whether the case presented a justiciable controversy justifying the Court in entertaining an action for declaratory judgment. After hearing arguments of counsel, and on the authority of the case of Baumann vs. Baumann, 250 New York 382, and the decision of the Supreme Judicial Court of Massachusetts, Hogan vs. Hogan, 70 N. E. 2d. 821, the Court has come to the conclusion that there is a justiciable controversy and that this action for declaratory judgment will lie.

> The court might add that of course, as has been indicated by the decisions of the Court of Appeals of this circuit, the Court should be reluctant to pass upon the validity of a divorce decree of another state and should do so only when there is no alternative and when the case can not be disposed of in some other way. This Court is of the opinion that the case at bar is such a case and therefore will entertain the action. (Tr. p. 32)

If there was an absence of jurisdiction by the District Court to entertain this action, subsequent proceedings including the affirmance of the judgment for the appellee by this Court cannot cure this fatal defect. If the Court below was without power to entertain this action the parties nor the Court below nor this Court may supply the absent jurisdiction. Neither is, in the language of Mr. Justice Holmes, "a dispensing power to give or withhold jurisdiction" U. S. Mayer (1914), 235 U. S. 55, 35 S. Ct. 16, 56 L. Ed. 129; Uline v. Uline (1953), 92 U. S. App. D. C. 281, 205 Fed. 2d 870.

At the outset of the trial, the Court became concerned as to whether it had jurisdiction. Appellant contended that the Court below did not, and the appellee contended successfully that the Court did have jurisdiction. The Court below narrowed the issue to justiciable controversy and upon the authority of Baumann v. Baumann (1929), 250 N. Y. 382, 165 N. E. 819 and Hogan v. Hogan (1947), 320 Mass. 658, 70 N. E. 2d 821, concluded that it has jurisdiction. It is respectfully submitted that in this action for declaratory relief there is absent both (a) a case or controversy, and (b) indispensable parties are not joined, either of which is sufficient to render the Court below without jurisdiction, and hence this Court ought to dismiss for want of jurisdiction. Snyder v. Buck (1950) 340 U. S. 15, 71 S. Ct. 93, 95 L. Ed. 15. This question of Jurisdiction is properly before this Court.

> "The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte, to proceed in the cause. And if the record discloses that the lower court was with-

> out jurisdiction this court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill. United States et al. v. Corrick et al., 298 U.S. 435

The Second Circuit Court of Appeals, in a per curiam opinion with Circuit Judges, L. Hand, Chase, and Paterson sitting, stated:

> "It is true that in Jarowski v. Hamburg-American Packet Co., 2 Cir., 186 F. 332, we held that the appellee might lose his right to raise the point. The circumstances were very unusual; the plaintiff had been beaten below, and had allowed her time to appeal to pass under a written stipulation of the defendant purporting to extend it. The appeal was nevertheless heard and the judgment reversed, 2 Cir., 182 F. 320, the defendant not suggesting our lack of jurisdiction. On a new trial the plaintiff recovered judgment; and thereupon the defendant moved without appeal to vacate all proceedings in this court, as being non-coram judicibus. That we denied; the defendant renewed the motion and we denied that also. The defendant's argument presumably was that no lapse of time could cure the fact that we had never had jurisdiction, and that we should correct our records. It is indeed hard to see quite what the answer was to that position; but the provocation was extreme, and it is clear that the scurvy, if not positively dishonest, conduct of the defendant was more than the court could bear. The decision has never since been cited, and, assuming that it is valid, it does not control here in any event, because the respondent did nothing affirmative to mislead the petitioners. The only other case to which we are referred, where a court has refused to take the point, is United States v. Todar, 7 Cir., 41 F. 2d 146, and there, as we understand it, rather than dismiss the appellant without a hearing, the court affirmed the judgment on the merits. It is true that at times that practice has been followed ex misericordia, but the proper disposition should even then always be dismissal, for it is clear that the court would be powerless to reverse. The general doctrine that courts are

> bound to refuse sua sponte to assume a jurisdiction not conferred upon them, applies as well to circuit courts of appeals as to the Supreme Court. Commissioner of Internal Revenue, (1940) 108 F. 2d 637.

The action in this case was brought pursuant to 28 U. S. C., Title 2201, The Federal Declaratory Judgment Act. After some thirty-four states had enacted declaratory judgment laws, Congress enacted the Federal Act in 1934. In commenting upon the Federal Act, Mr. Justice Jackson stated:

> "Its enabling clause was narrower than that of the Uniform Act adopted in 1921 by the Commissioners on Uniform State Laws, which gave comprehensive power to declare rights, status and other legal relations. The Federal Act omits status and limits the declaration to cases of actual controversy." Public Service Comm'r v. Wycoff Co., (1952), 344 U. S. 237, at 241.

It is suggested that the requirement of case and controversy may be more limited in the Federal Act than in the various state enactments, (Most states have adopted the Uniform Declaratory Judgment Act.) 9 Uniform Laws Annotated 232.

It is respectfully submitted that in the instant case the constitutional test of Aetna Life Ins. Co. of Hartford, Conn. v. Haworth (1937) 300 U. S. 227, 241, 57 S. Ct. 461, was not met.

> "Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or payment of damages."

It does not appear to appellant that this Court has decided this question in this posture. The essential weakness is that nothing final may be determined other than a question of the status of one person which might be subject to attack elsewhere, again and again by others not a party to this proceeding. In deciding whether to apply this remedy

as requested here it might be well to note the difference between the Federal Act and the various statutes. That the various states will determine the validity of marriage status in a declaratory proceeding must be conceded. 9 Uniform Laws Annotated 232, Section 1, and cases collected; But see Carr v. Carr (1954), 279 S. W. 2d 147. It would appear that the Federal Constitutional requirement of case and controversy can not be met here because after the declaration there will be more unresolved issues present than before.

If the status here be a proper subject matter for declaratory relief the absence of the party to the second marriage and maybe the adopted child would seem to be indispensable parties. Technical Tape Corporation v. Minnesota, Min & Mfg. Co., (1955), 135 F. Supp. 505.

From an examination of all of the cases collected in the note to the Uniform Declaratory Act it appears that in only one case did the Court grant relief in a similar situation to this, where all the interested parties were not joined, and the question was raised. See note to 9 Uniform Laws Annotated 232, Section 1. Appellants have found but one case where the court proceeded without the absent party or parties, and that was an inferior State Court. In Smerda v. Smerda (1947), 74 N. E. 2d 751, the Court of Common Pleas of Ohio proceeded, but it does not appear that the question was raised. The court below relied upon Baumann v. Baumann, et al, 250 N. Y. 382, which we urge is not in point because the second wife was made a party. In Vannichio v. Vannichio, (1955) 269 App. Dir. 678, 53 N. Y. S. 326, the Supreme Court, Appellate Division, Second Dept., did not even cite the Baumann case in dismissing a complaint where the party to second marriage was absent. Neither is the Hogan v. Hogan et al., (1947) 320 Mass. 658, 70 N. E. 2d 821, in point because all the parties were before the Massachusetts Court. Our research discloses but the single Ohio inferior Court opinion which did not have the question put before it. The rationale of the result would seem obvious in such a situation, what can be determined that will be of binding force and effect? The mere statement of the question forces the conclusion

that in such a case the requirement of justicable controversy and indispensible parties is fatally absent.

This very question was raised in Massachusetts, the second jurisdiction relied upon by the Court below. In Witzgall v. Witzgall, (1956) 334 Mass. 365, 136 N.E. 2d 219, the first wife sued the husband and the second wife for a declaration of marital status. There the Court said:

> "The Respondent Roland contends in effect that the Probate Court had no jurisdiction to entertain this petition because it did not properly have all the parties in interest before it. He relies upon C. 231A, Sec. 8 which reads in part: 'When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding.'
>
> It does not appear in the record that this issue was brought to the attention of the judge during the hearing, except by an amended answer. We agree that questions of jurisdiction of a court over the subject matter or parties may be raised at any stage of the proceedings. Cohn v. Cohn, 310 Mass. 126, 129, 37 N.E. 2d 260". . . .
>
> We conclude, therefore that Marie received suitable notice of these proceedings and, if she chose not to appear and participate in them, she or Roland cannot now be heard to complain."

c) If the absent parties are determined by this Court not to be indispensable, nevertheless, this Court ought dismiss this action in the exercise of its discretion under 28 U.S.C., Section 2201.

The Courts have a broad measure of discretion in deciding whether to grant or deny declaratory relief. This remedy creates no rights flowing to the litigants. Public Service Commissioner v. Wycoff Co., supra. If the Court is unimpressed with what appellant has argued, it is respectfully submitted that if there ever was a case in which a Court should not use this equitable remedy, this is it. The judgment has declared that the foreign decree is void; who does that bind and where? The judgment has declared that appellant and appellee are

husband and wife; will this make a marriage where for twelve years apparently everything else has failed? The judgment has declared that appellee's property interest in the District of Columbia is not affected, besides stating that which was conceded, has appellee received any legal benefit by this ruling? Yet the effect of this declaration is to cast doubt upon the validity of the status of all concerned, including an innocent child, in this jurisdiction and elsewhere.

The effect of this judgment is not to settle any controversy but, on the contrary to create and stimulate controversy.

CONCLUSION

Petitioner respectfully submits that the matters herein before are presented in good faith and not for delay. A consideration thereof is necessary to a just and equitable decision of this matter. It is respectfully urged that this Court grant a rehearing in the above-entitled case, and upon such rehearing and further consideration to reverse its opinion rendered herein on October 9, 1958, and dismiss this cause of action; or, failing in that, to modify such opinion dated October 9, 1958, and reverse the judgment below.

Respectfully submitted,

COBB, HOWARD AND HAYES

GEORGE E. C. HAYES

HERBERT O. REID

613 F Street, N. W.
Washington, D. C.

Attorneys for Appellant

Of Counsel:

Julian R. Dugas
George H. Windsor
613 F Street, N. W.
Washington, D. C.

CERTIFICATE

George E. C. Hayes, counsel for the appellant, James E. Roberts, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

George E. C. Hayes

Attorney for Appellant-
Petitioner

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing appellant's petition for rehearing was served by us on Joseph Waddy, Attorney for appellee, 615 F Street, N. W., Washington, D. C. on October 25, 1958.

George E. C. Hayes

Attorney for Appellant-
Petitioner

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 12 1958
Joseph W. Stewart
CLERK

No. 14,367

JAMES E. ROBERTS,

Appellant,

v.

GLADYS S. ROBERTS,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOSEPH C. WADDY
WILLIAM C. GARDNER
WILLIAM B. BRYANT
615 F Street, N. W.
Washington 4, D. C.
Attorneys for Appellee

Of Counsel:
MARION C. GEORGE, JR.

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee the sole question presented by this appeal is:

> Whether the finding of the District Court, based upon a multiplicity of facts in evidence, both oral and documentary, that appellant had not made a bona fide change of domicile, is clearly erroneous.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,367

JAMES E. ROBERTS,

Appellant,

v.

GLADYS S. ROBERTS,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

Inasmuch as appellant has pitched his attack primarily upon the sufficiency of the evidence to sustain the judgment, but has omitted from his Statement of the Case all items of evidence contrary to his contentions, appellee undertakes the following Counter-Statement of the Case:

Appellant is a physician who has been practicing medicine in the District of Columbia at the same address since 1941 (J. A. 26). He and

appellee were married in the District of Columbia March 27, 1937, and thereafter lived together in the District of Columbia until their separation about twelve years prior to the trial of this suit. During the time they were living together they acquired, as tenants by the entireties, real property in the District of Columbia known as 1233 Kearny Street, Northeast. After the separation appellant attempted unsuccessfully on three different occasions to obtain a divorce from appellee in the District of Columbia. The last of these divorce suits was dismissed in the United States District Court for the District of Columbia on June 15, 1955 (J. A. 20). Thereafter, during the latter part of August, 1955, appellant went to Hot Springs, Arkansas, where, on November 2, 1955, he brought suit against appellee for a divorce and, on December 7, 1955, obtained a decree purporting to grant him an absolute divorce from appellee and to restore to each party all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage, and in consideration or by reason thereof (J. A. 6).

Three days after obtaining the alleged divorce appellant married one, Sylvesta R. Roberson, in Hot Springs, Arkansas, (J. A. 8). On January 13, 1956, appellant returned to the District of Columbia and resumed his medical practice at the same location that he had occupied for 14 years prior to his going to Hot Springs, Arkansas (J. A. 15).

Upon appellant's return to the District of Columbia appellee brought suit in the United States District Court for the District of Columbia, praying that the Arkansas divorce decree of December 7, 1955, be declared null and void; that she be declared the lawful, undivorced wife of appellant, and that her interest in the Kearny Street property be declared to be unaffected by the Arkansas decree. Appellee's suit was tried in District Court by the Court without a jury. At the conclusion of the trial the Court made Findings of Fact and Conclusions of Law (J. A. 13-16), and entered its Judgment granting appellee the relief prayed for (J. A. 16). Appellant's motion for a new trial was heard and

denied (J. A. 19, 74). Appellant thereupon appealed to this Court.

At the trial of this cause the evidence consisted, for the most part, of (a) stipulations of the parties; (b) excerpts from a pre-trial deposition of appellant, and (c) oral testimony of appellant and two witnesses. In addition, certain documents were admitted either by stipulation or as incident to the oral testimony.

The facts concerning the marriage of the parties, their marital domicile, their separation, the prior divorce proceedings in the District of Columbia; the ownership of the real property, and the date of appellant's return from Arkansas, and resumption of practice in the District of Columbia were stipulated (J. A. 20, 21, 25, 26). The following facts also were stipulated: That the domicile of appellant prior to his departure in August, 1955, was the District of Columbia (J. A. 21); that the Arkansas law requires domicile within the State for a period of three months prior to the granting of a divorce, two months of which must be prior to the filing of the divorce proceedings (J. A. 21); that appellant consulted an attorney about a divorce within a day or so after his arrival in Hot Springs (J. A. 25); that appellee was not served with process in Arkansas; that the only service upon her was constructive, by registered mail in the District of Columbia, and that she did not appear or participate in any manner in the Arkansas proceedings and signed no waiver therein (J. A. 21, 26); that appellant did not take his automobile to Arkansas (J. A. 24); that while he was in Arkansas appellant's home telephone, gas, electric and fuel bills in the District of Columbia remained in his name (J. A. 24); that no notice of change of address was sent either to the Post Office Department, the Building and Loan Association, or to the publications to which appellant subscribed,either prior to leaving the District of Columbia or during the time he was in Arkansas (J. A. 24); and that he maintained his bank account in the District of Columbia and also opened an account in Arkansas (J. A. 24).

Excerpts from appellant's pre-trial deposition were introduced by appellee in which appellant, in reply to questions put by counsel for appellee, had made statements and admissions as follows: That he was affiliated in a professional capacity with Howard University and Freedmen's Hospital; was a member of certain professional organizations in the District of Columbia and chairman of the Board of Censors of one of them (J. A. 28, 29, 30); that he was the President of the Empire Diaper and Linen Service, Inc. in the District of Columbia, with the responsibility of co-signing all checks and handling all big financial transactions in his name (J. A. 29, 30, 31); that he had never been to Hot Springs, Arkansas, prior to his going there in August, 1955, but had once crossed the Mississippi River from Memphis into the State of Arkansas (J. A. 33); he knew several physicians in Arkansas but had not corresponded or talked to them prior to his going to Hot Springs about professional or employment opportunities in that City; he knew he wanted to go to Hot Springs from having talked years before with one, James Hackney (J. A. 34); that the only arrangements he made for employment or his professional activities prior to his leaving the District of Columbia for Hot Springs was to apply to the Arkansas Medical Board for a license (J. A. 34); that before going to Hot Springs he wrote for a reservation in a "hotel rooming house" (J. A. 31); that he went directly from Washington to Hot Springs by train and took with him his personal effects, luggage and small hand tools (J. A. 31); his office furniture and heavy equipment were left in his office at 1209 Q Street, Northwest, in the District of Columbia, where they remained while he was away (J. A. 33, 34, 38); he arrived in Hot Springs either the last day of August or the first of September (J. A. 36); that prior to leaving for Hot Springs he was living at 1233 Kearny Street, Northeast, and had been living there since 1945 (J. A. 29); his brothers took some of the chairs from his house but most of his furniture remained in the home (R. 35); that he did not give his bankers in Washington or the District Tax Assessor any change of address but did tell Howard University and Freedmen's Hospital that he

was leaving; that in Hot Springs, Arkansas, he lived as a roomer in the home of a Mrs. Carey until about November, 1955, and then moved to 717 Pleasant Street, where he remained until his return to Washington about the middle of January, 1956 (J. A. 36); that he never filed any Arkansas income tax returns but did file District of Columbia income tax returns for the years 1955, 1956, and 1957, and Federal income tax returns for the same years and sent them to the Collector at Baltimore (J. A. 37); that when he returned to the District of Columbia he resumed living at his home at 1233 Kearny Street, Northeast, and his practice at the same location it was prior to his departure (J. A. 30); his mother returned to live with him at his home (J. A. 38); and, during the year 1956, he resumed his teaching activities at Howard University and his position on the staff at Freedmen's Hospital, without any formality (R. 38, 39).

Appellee called two witnesses. The first, Harry J. Robinson, the owner of the premises where appellant maintained his office, testified that appellant occupied the property under a written lease and identified the lease which was to run for fifteen years from February 20, 1941 (J. A. 40). He testified also that during August, 1955, appellant informed him that he was going to give up his practice and leave town; that he didn't know where he was going but that he would hear from appellant later (J. A. 41). Appellant did not make any arrangement for cancellation of the lease (J. A. 41). During the summer of 1955, prior to his leaving Washington, appellant made repairs to his office for which the witness signed a note which was paid off by appellant (J. A. 40, 43). This witness stated that appellant made no rent payments while he was away but after his return he "picked up the usual payment, but since that time he has paid some months doubly to pick up for the time he wasn't there." (J. A. 41). Upon cross-examination, the witness testified that he noticed that appellant's name was removed from the door of the office and that there was a notice on the door for the patients to go to some other doctor (J. A. 43); and that he took no steps to rent the place

prior to appellant's return from Arkansas (J. A. 44).

LeRoy F. Clark, an employee of the C. & P. Telephone Company, produced records of that company and testified that those records showed that a telephone bearing number HObart 2-7733, has been listed in appellant's name at his office address since September 15, 1941; that on August 28, 1955, an order was given to the company to "suspend" the service of this number; that "suspended" service means a more or less temporary service "especially designated for people that are going on vacation or that have no need for their telephone for a period not to exceed a year;" that subscribers pay for this service at a discounted rate, and do not have to reapply for service if they return to the City; that the suspension order held appellant's telephone number during the time he was away and that service was restored to the same number on January 13, 1956 (J. A. 46, 47). On cross-examination, the witness stated that the records did not disclose any application for a discontinuance of the telephone service; that it is possible that the company might suggest suspension of a phone, but "they try to establish that the person will return to the city, or to that effect" (J. A. 47, 48).

Appellant was his only witness. He testified that after June, 1955, he thought he would change to another environment; that he knew most about Hot Springs, Arkansas, from contact with a friend in 1949, who told him about the hot water season and the racing season there; that he referred his business on this end to two physicians (J. A. 49); told as many of the business people as he had direct contact with; gave his brother a power of attorney to take care of his business in Washington; told the head of the service at the hospital that he was leaving for good; took his sign from his door and placed a notice thereon referring his patients to two other physicians; had a friend to make arrangements for him in a hotel in Hot Springs; took his small equipment with him and left his large equipment because it wasn't worth taking (J. A. 49, 50). He testified also that before leaving Washington he wrote to the Secretary of the Medical Board in Arkansas for reciprocity from the District of

Columbia and finally received a certificate to practice in Arkansas on November 30, 1955 (J. A. 51); that prior to receiving the certificate he helped out one of the other doctors, "attended all the Medical Society Meetings and took an active part in the OB Clinic there, and went to the hospital" (J. A. 52); that about November 1, 1955, he moved from the hotel into an apartment and put in a telephone; that he paid his poll tax; registered to vote for the year 1956; paid occupation tax to the City of Hot Springs for 1956; received mail in Arkansas; voted as an absentee in October, 1956, after his return to the District of Columbia; and initiated proceedings in Arkansas to adopt a child. He stated that the repairs to his office were occasioned by termite damage to the woodwork; that the work was discussed in the spring and completed in July, 1955. Appellant testified that he returned to the District of Columbia because there was a bill before the Arkansas Legislature to close out horse racing; that the hot water season was over; he had to do something with all his expenses; that his mother, who had lived with him a number of years (and who had continued to live in his Washington home for a while during his absence) (J. A. 61), was a hypertensive and had convulsions that year (J. A. 59); and that he had to help with the administration of his business in Washington. He also testified that he had called to have his telephone cancelled and a lady at the telephone company suggested to him that if he planned to sell his business a letter from him would make it possible for him to let someone else use that telephone, but he "had no intention of doing that" (J. A. 62).

Documentary evidence introduced by appellee established that appellant filed his suit for divorce in Hot Springs, Arkansas, on November 2, 1955, and that he served notice of his intention to wed and applied for a license to wed Sylvesta R. Roberson on the same day that the Arkansas divorce was granted.

After considering all of the foregoing evidence the trial Court found that appellant did not make a bona fide change of residence, and that his leaving the District of Columbia and acquiring a technical

residence in Arkansas was done solely for the purpose of establishing a means of getting a divorce. He thereupon concluded that appellee was entitled to the relief prayed for and entered judgment in her favor. It is from that judgment that appellant has appealed.

STATUTE INVOLVED

The United States Constitution, Article IV, Section 1, in pertinent part provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.

SUMMARY OF ARGUMENT

The only issue involved in this case was whether appellant had changed his domicile from the District of Columbia to Hot Springs, Arkansas so as to give the Arkansas court jurisdiction to grant him a decree of divorce. Upon this issue, one of mixed fact and law, the trial court properly weighed all the evidence relevant thereto and concluded that no bona fide change had occurred. This conclusion is amply supported by the evidence and clearly is not erroneous.

Inasmuch as the trial court found that appellant was not domiciled in Arkansas, and this finding was supported by a multiplicity of facts in evidence, both oral and documentary, any presumption of validity of the Arkansas decree was overcome, and the trial court properly refused to recognize that decree.

ARGUMENT

I

THE COURT'S FINDING THAT APPELLANT DID NOT MAKE A BONA FIDE CHANGE OF DOMICILE FROM THE DISTRICT OF COLUMBIA TO ARKANSAS IS NOT ERRONEOUS.

A determination that a change of domicile has occurred involves a compound consideration of fact and law. The factual elements involved

are: (1) residence in fact in another place (2) an intention to abandon the old domicile and (3) an intention to make the new place of residence one's home. Texas v. Florida, 306 U.S. 398, 83 L.Ed. 817 (1939); Shilkret v. Helvering, 78 U.S. App. D.C. 178, 138 F.2d 925 (1943); Guessefeldt v. McGrath, 89 F. Supp. 344 (1950), aff'd 88 U.S. App. D.C. 383, 191 F.2d 639 (1951), rev'd on other grounds 342 U.S. 308, 96 L.Ed.342 (1952).

The dominant factor in the change of domicile is intention; for a domicile once acquired is presumed to continue, notwithstanding a change of residence, until the intent to establish a new domicile and to abandon the old is shown. Shilkret v. Helvering, supra; Deming v. U. S. ex rel. Ward, 59 App. D.C. 188, 37 F.2d 818 (1930); Pickering v. Winch, 48 Ore. 500, 87 P.763 (1906). This intention, being subjective, often involves special difficulties in proof. Nonetheless, it must be inferred from all the circumstances; and, in the last analysis, the question for the trier of fact is what is the relative importance of the different circumstances - whether those circumstances tending to show the existence of the required intention are of greater weight than those tending the other way. Pickering v. Winch, supra; Com.v. Kendall, 162 Mass. 221, 38 NE 504 (1894). So, in the instant case, the trial judge found facts and circumstances tending both ways; concluded that the greater weight lay with those tending to negate the existence of an intention on the part of the husband to abandon his domicile in the District of Columbia and establish a home in fact in Arkansas; and found, accordingly, that there had been no change of domicile. His finding on the question of intention and his conclusion on domicile are not to be set aside unless clearly erroneous. Jeffe v. Jeffe, 80 U.S. App. D.C. 284, 152 F.2d 24 (1945); Diggs v. Diggs, 53 App.D.C. 56, 288 Fed.262 (1923). We feel that it can be fairly demonstrated that there is no error.

To support his contention that the finding below was erroneous, appellant relies upon what he characterizes in his brief as "Steps Taken Evidencing Appellant's Intention To Abandon His District of Columbia Domicile" and "Steps Taken Indicating Appellant's Intention To Acquire New Domicile In Hot Springs, Arkansas." For the convenience of the Court we will comment upon each of these steps, in like order, but in the light of those portions of the whole evidence which relates to each respectively.

Steps Taken Evidencing Appellant's Intention to Abandon His District of Columbia Domicile

1. Harry Robinson, appellant's landlord, testified that in August, 1955, appellant told him he was "giving up his office, giving up his practice, and was going to leave town" that he didn't "know just where he was going," but that he would "hear from him later" (J. A. 41). But Harry Robinson also testified that appellant's lease did not expire until February, 1956, a time after appellant had returned from his sojourn in Arkansas; that just prior to his departure appellant had had certain repairs done to the office and had undertaken to pay for those repairs, and did pay for them (J. A. 40); that appellant expressed uncertainty as to his future plans (J. A. 41) and did not indicate where he was going and made no agreement with respect to the cancellation of the lease (J. A. 41). Moreover, appellant himself admitted that he left this office intact as far as its furnishings and equipment were concerned, except for some small hand tools which he took with him (J. A. 33, 34, 38). He did not even discontinue his office phone service; he merely suspended it, so that the same number was held for him during his sojourn, but at a discounted rate (J. A. 47). Then, after being away less than five months, appellant returned to the District, took his telephone out of suspension (J. A. 47), resumed practice in this same office (J. A. 38, 44) and paid the rent which had accrued during his absence (J. A. 42).

Thus appellant's self-serving declarations that he was giving up his office and practice lacks persuasiveness when considered in the light of these other circumstances. See, Texas v. Florida, supra; District of Columbia v. Murphy, 314 U.S. 441, 86 L.Ed. 329 (1941). Appellant's actions speak louder than his words, and, where his declarations are inconsistent with his acts, his conduct is of greater evidential value than his declarations. Texas v. Florida, supra; Neal v. Neal, 53 Ohio L. Abs. 329, 85 N.E. 2d 147 (C.P. 1949); Pickering v. Winch, supra. Clearly, these circumstances support, indeed impel, the conclusion that appellant had no intention of giving up his office or his practice and did not in fact do so.

2. At the time of his departure appellant, in person and by notice posted on his office door, directed his patients to two other doctors. But this circumstance tends, not toward abandonment but, if anything, toward retention of his practice. Ordinary experience would lead one to expect a physician to direct his patients to other doctors even if he were to be absent only on a two-week annual vacation. And here, the inference arises that appellant did contemplate only a temporary absence; for, the fact that, after hand picking two doctors, he contacted his patients and informed them that they would have to select one of these two doctors (J.A. 50), instead of leaving them to disperse themselves at large among the many, many doctors throughout the city, strongly suggests that he was relying upon these two doctors to hold his practice for him temporarily. To so conclude is, to say the least, not unreasonable.

3. In the same month that he left the District of Columbia for Arkansas, appellant wrote to the Arkansas Medical Board requesting reciprocity and a certificate to practice medicine in that state. This certificate, however, was not issued to him until after he had departed from Washington and had been in Arkansas three months. Less than a month and a half after he was issued the Arkansas license he was back in the District practicing medicine in the same office he had been maintaining for approximately fifteen years!

If appellant had been operating under a bona fide intention to pull up his deep roots here and establish himself elsewhere, if he had been seeking a foreign license so that he might continue his profession in his new location, rather than for the purpose of simulating a new domicile for a divorce, would he not have actually obtained that foreign license before he pulled up those roots here? And is it reasonable to believe that this appellant, after putting fifteen years into building a practice here, after securing positions for himself on the staffs of Freedmen's Hospital and Howard University Medical School, intended to give it all up and leave it all behind to make a new and permanent home in a strange locale where he had never been before (J. A. 33)? And without making any arrangements for employment or for his professional activities there, other than applying for a license (J. A. 34)? Or without even inquiring of anyone in the whole state of Arkansas regarding the employment and professional opportunities there (J. A. 34)? And relying solely upon what a friend, then deceased, had told him six years before about the hot water baths and horse racing attractions in Hot Springs? Surely, the trial judge would be hard put to attribute such a foolhardy intention to appellant. Surely, he did not err in drawing the inference to the contrary.

4. When appellant left for Arkansas he resigned his position as chairman of the Board of Censors of the Medical Chirugical Society, a local organization, and was replaced as clinical instructor on the staffs of Freedmen's Hospital and Howard University Medical School. If the resignation from his position as chairman of the Board of Censors in the Chirugical Society is of any materiality here, it is significant to also note that appellant was also on the Board of Directors of the same group (J. A. 29); yet there was no evidence that he resigned from his position on the Board of Directors. As for his positions as clinical instructor at Howard and Freedmen's, appellant resumed both for the school year beginning next after his return to the District, without the necessity of formality or procedure. There is little here to persuade a trial judge

that appellant had burned his bridges behind him with respect to these connections.

5. Appellant relies upon the fact that the house in which he had lived for ten years was rented during his absence as being evidence of his intent to abandon his Washington domicile. We feel that this circumstance, when weighed in combination with other circumstances, more reasonably serves as a basis for a contrary inference.

It seems that his house was rented for only a part of appellant's four and one-half month's absence (J. A. 61). During the whole period appellant's furniture remained in the house. His mother continued to live in the house during part of the time. The electric and gas services continued in his name. Even the fuel oil with which the house was heated was charged to appellant's account (J. A. 35)! Although appellant had been a practicing physician in the District for almost fifteen years and, presumably, had acquired many correspondents and contacts, both of a business and social nature, neither prior to leaving the District nor during the whole time he was absent did appellant give any notice of change of address to the Post Office Department, the Building and Loan Association which held an outstanding note secured on this house, the publications to which he subscribed (J. A. 24), the bank with which he continued to maintain an account (J. A. 35, 36), or the Tax Assessor of the District of Columbia (J. A. 36). Indeed, he did not even change his home telephone listing (J. A. 35)! Clearly, this conduct does not comport with that of a man intent upon giving up a residence and establishing a new and permanent one elsewhere. Clearly, these circumstances amply support an inference of lack of intention to abandon his domicile.

6. At the time of his departure, appellant was also co-owner of a local business known as the Empire Diaper Linen Service, Inc. He was, and still is, the president and chief executive officer of the business and his brothers were his plant managers (J. A. 30). When he left the District for Arkansas, he did not resign as the chief executive officer of

this firm; he merely made one of his brothers his agent to "take care of (his) business here" (J. A. 50). Now obviously this type of device is not adequate for the permanent operation of a business. If appellant intended a bona fide permanent residence in Arkansas he would not have appointed an agent to discharge the official duties for which he was responsible; he would simply have resigned so that someone else might assume the responsibility. The fact that he remained president of this firm and was in fact gone for less than five months is a circumstance strongly supporting the trial judge's conclusion that appellant had not abandoned his domicile in the District of Columbia. See, Neal v. Neal, supra; Miller v. Miller, 173 Miss. 44, 159 So. 112 (1935); Cochran v. Cochran, 173 Ga. 856, 162 S. E. 99 (1931).

7. The record does not support appellant's claim that he attempted to cancel his telephone service at his office but was advised by the telephone company that there was a convenience in retaining same in a suspended status (J. A. 61, 62). It is a matter of common knowledge that, if a subscriber wants his telephone service cancelled and requests the company to cancel it, it will be cancelled. Appellant, himself, testified in response to a question put to him by his own counsel, that he had no intention of letting someone else use that telephone (J. A. 62). Thus, how could maintaining the telephone in suspension at a monthly expense be a convenience to appellant if he were absenting himself from the District of Columbia permanently? The record reveals clearly that appellant ordered his office telephone service suspended in August, 1955; that suspended service is available, at a discounted rate, to subscribers who temporarily have no need for their telephone for a period not to exceed a year. When the subscriber wishes to restore his service to an active status he may do so without having to reapply for service and with his telephone number unchanged (J. A. 47). This was the type of service appellant ordered; and he did so simply because he did not intend to be gone long and he did not want his business number altered. This is the

only sensible inference that can be drawn. Appellant's attempted explanation of this devastating evidentiary fact is absurd and has no foundation in the record.

Steps Taken Indicating Appellant's Intention To Acquire New Domicile In Hot Springs, Arkansas

It seems clear from a fair appraisal of the foregoing circumstances that appellant did not have the intention to abandon his domicile in the District of Columbia at the time he departed for Arkansas. We feel that a consideration of the several steps which appellant points to in his brief (p. 8) as evidencing his intention to make Hot Springs, Arkansas, a new domicile, in the light of all the circumstances, will just as clearly reveal that appellant never formed an intention either to abandon his District domicile or to acquire a new bona fide domicile in Hot Springs.

1. The fact that appellant rented a room and a four room apartment with telephone listed in his name certainly tends to prove that appellant was present in Hot Springs, Arkansas. However, his presence is conceded; his intention is what is at issue. The fact that appellant rented a room and an apartment seems to us to be of little significance on this issue; for appellant had to have a place of abode for the months during which he was in Hot Springs obtaining a divorce, irrespective of his intention. What does seem to us to be of significance is the fact that appellant, though he disposed of none of the furniture in his District home, moved none of it to Hot Springs, even after he had obtained an apartment there. He did not even take his automobile to Hot Springs (J. A. 24). And, again, the failure to give notification of change of address looms large. If appellant, in his circumstances and with his connections, were making a new and permanent home at his place of abode in Hot Springs, Arkansas, he, most certainly, would have notified the City Post Office in Washington, D. C., the Building and Loan Association, his bank, and his publishers, that his address was then 717 Pleasant Street, Hot Springs, Arkansas, and not 1233 Kearny Street, Northeast, in the District of Columbia. The most reasonable inference

from the failure of appellant to give such notice is that he had no intention of burning his bridges behind him, but, on the contrary, was intending to, and did, keep them intact and ready for his early return.

2, 3, 5. It will be remembered that when appellant left the District in August he did not even have a certificate to practice medicine in Arkansas, and did not obtain one until he had been there three of the four and one half months he remained there. He testified that while waiting for his certificate to be issued to him he worked with an unidentified doctor in Hot Springs, "just helping out," attended Medical Society meetings, and took an active part in the "OB clinic" in an unidentified hospital there (J. A. 52). The record does not disclose what appellant's professional activities in Hot Springs amounted to after November 30, 1955, the date on which he received his certificate. He claimed that he undertook to practice but he also stated that he received no income from there (J. A. 37). The record does show that appellant was back in the District of Columbia and had resumed his practice in the District within forty-five days after receiving the certificate to practice in Arkansas, within twenty-seven days after receiving his Arkansas divorce, and within three days after paying the 1956 occupational tax on the practice of medicine in Arkansas (J. A. 53).

The lack of bona fides in appellant's residence in Hot Springs becomes even more glaring when we consider his testimony in reply to his counsel's inquiry as to why he returned to the District of Columbia. Appellant asserted the prime reason for his return to be a legislative bill to close horse racing in Hot Springs, which, though only pending before the Arkansas legislature, had made business so bad that he was not making any money (J. A. 59). But, in his sworn Answer To Complaint, appellant had already stated that "the only reason he had returned to the District of Columbia since establishing his residence in the State of Arkansas was because of the sudden serious illness of his mother and the threatened failure of a Diaper Washing Business in which he had a

substantial interest and which was the sole means of income for the other members of his family." (Underscoring ours) (J.A. 12).

No doubt realizing the variation between the appellant's testimony and his Answer, counsel for appellant proceeded to prod appellant for "any other reason for coming home" (Underscoring ours) (J.A. 59). Appellant responded by referring hazily to "my expenses here" and a bill owed "Mr. Waddy" (J.A. 59). Finally, as though in afterthought, he trailed off with his mother's illness and the condition of the Diaper business (J. A. 59, 60).

There is a startling similarity between the maneuvers of this appellant and those of the husband-defendant in the case of Hall v. Hall, 196 Miss. 478, 24 So. 2d 347 (1946). There Dr. Hall, after leaving Mississippi for Nevada, carrying with him personal effects, sent back for some of his surgical instruments and devices; consulted with Nevada attorneys concerning a divorce the second day after his arrival there; immediately upon the expiration of the required time filed a suit for divorce, and, while this suit was pending, passed the medical examination requisite to practicing medicine in Nevada, procured a license, and did in fact engage in practice there in association with a local doctor; obtained a Nevada divorce decree and promptly returned to Mississippi and resumed his practice there. The Mississippi trial court was held not to have erred in finding that Dr. Hall had not established a domicile in Nevada and in setting aside the Nevada divorce decree at the instance of the wife. The trial judge in the instant case is in like manner entitled to affirmance. See, Com. v. Kindall, 162 Mass. 221, 38 N.E. 504 (1894).

4. While in Arkansas, appellant registered to vote in that State for the year 1956. This fact is, of course, highly relevant on the issue of domicile; but is by no means controlling. D.C. v. Murphy, supra. It is simply a fact, with the other facts in a case, to be weighed by the trier of the facts and may be overbalanced by other circumstances. Hiatt v. Lee, 48 Ariz. 320, 61 P. 2d 401 (1936). The record discloses that the trial court found that appellant did register to vote in Arkansas

for the year 1956, and, after having resumed his practice in the District did vote as an absentee in 1956. It then properly weighed this fact along with the other circumstances which we have just considered, and together with the additional fact that appellant did not vote in the 1957 election, and reached the conclusion that appellant did not make a bona fide change of domicile. It cannot reasonably be claimed that this conclusion cannot fairly be drawn from all the circumstances attending appellant's departure and return to the District of Columbia. Indeed, a conclusion to the contrary is repugnant to everyday experience and common sense.

6. The fact that appellant, after his divorce and remarriage, hurriedly undertook the adoption of a child in Hot Springs will not serve to document appellant's claim to Arkansas domicile. It is not material; for the Arkansas adoption statute is indifferent to the domicile, or the residence, of the adopting party. It provides that any person desirous of adopting any child may file a petition therefor in the probate court of the county in which the child resides. Dean v. Brown, 216 Ark. 761, 227 S. W. 2d 623 (1950); Minetree v. Minetree, 181 Ark. 111, 26 S. W. 2d 101 (1930); Morris v. Pendergrass, Adm'r., 59 Ark. 483, 28 S. W. 30 and 430 (1894). Furthermore, the speed with which appellant undertook the adoption is consistent with an intent to rush through the adoption so that his return to the District of Columbia would not be delayed.

It is plain from an examination of the record (J. A. 13, 15, 75, 76) that the trial court did not regard the fact that appellant obtained his Arkansas decree with all speed possible as controlling per se, but only as one of the factors to be considered on the issue of intent. Nor can appellant obscure the simple issue involved here by invoking principles properly raisable in a suit for divorce. We are not concerned in this appeal with the merits of appellant's Arkansas suit for divorce; we are confronted with the narrow issue of whether appellant had the required domicile to give the Arkansas court jurisdiction. While the Arkansas divorce law was obviously intended to facilitate the obtaining of divorces, its provisions can be availed of only by one who actually and in good

faith becomes domiciled in the State for the period of time required by the statute. Kennedy v. Kennedy, 205 Ark. 650, 169 S.W. 2d 876 (1943). A fair appraisal of the evidence contained in this record makes it plain that the appellant had not met this requirement, and, in so finding, the court below committed no error.

II

ANY PRESUMPTION OF THE VALIDITY OF THE ARKANSAS DIVORCE DECREE WAS OVERCOME BY APPROPRIATE EVIDENCE OF APPELLANT'S LACK OF DOMICILE IN ARKANSAS.

While there is a presumption of the validity of a foreign divorce decree as against an attack on the jurisdictional ground of lack of domicile in the foreign state, this presumption is rebuttable by evidence of the attacking party showing this lack of domicile, Rice v. Rice, 336 U.S. 674, 93 L.Ed. 957 (1949); for no decree is entitled to full faith and credit under Article IV of the Constitution unless the court entering the decree had power, i.e., jurisdiction, so to do. Williams v. North Carolina, 326 U.S. 226, 89 L.Ed. 1577 (1945). We feel that it has been fairly demonstrated above that the evidence in this case, taken in its entirety, and with most of it from the mouth of the appellant himself, impelled the conclusion that the appellee had sustained the burden imposed upon her in a matter of this kind; that the Arkansas court was defrauded by appellant into the belief that it had jurisdiction of his divorce action, when in fact, appellant had gone into that State for the sole purpose of getting a divorce decree; that he had not intended to be a resident of that State and did not, in fact become one, and that he never abandoned, nor intended to abandon, his domicile in the District of Columbia.

Where, as here, a claim of bona fide domicile is betrayed by the evidence, this Court has consistently upheld the lower court in so finding and refusing to recognize the foreign divorce decree. Ryan v. Ryan, 97 U. S. App. D.C. 288, 230 F. 2d 838 (1956); Hobbs v. Hobbs, 91 U.S.

App. D.C. 68, 197 F.2d 412 (1952); Huggs v. Huggs, 90 U.S. App. D.C. 237, 195 F.2d 771 (1952); White v. White, 80 U.S. App. D.C. 156, 150 F.2d 157 (1945); Sears v. Sears, 67 U.S. App. D.C. 379, 92 F.2d 530 (1937). We submit that there is nothing to warrant this court in doing otherwise in this case.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment appealed from be affirmed.

JOSEPH C. WADDY
WILLIAM C. GARDNER
WILLIAM B. BRYANT
615 F Street, N. W.
Washington 4, D. C.
Attorneys for Appellee

Of Counsel:
MARION C. GEORGE, JR.